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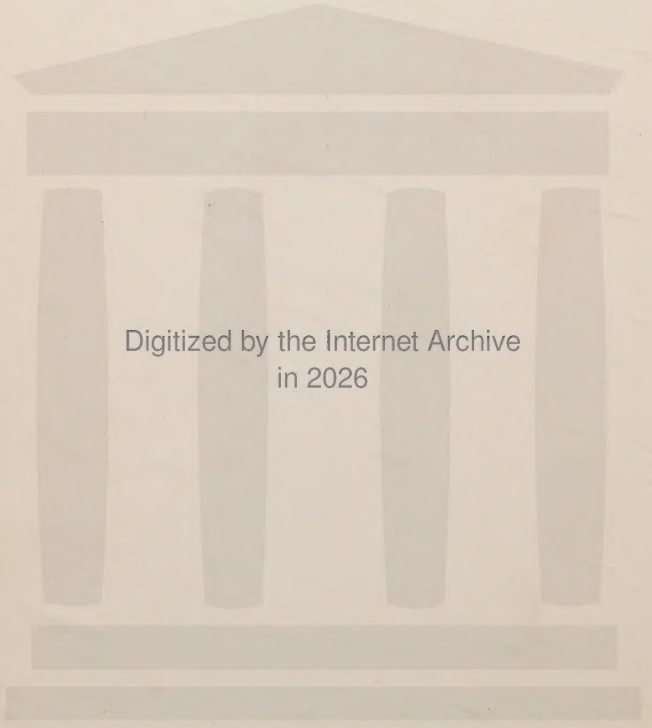

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THE ELEMENTS OF BUSINESS LAW

WITH ILLUSTRATIVE EXAMPLES AND PROBLEMS

BY

ERNEST W. HUFFCUT

DEAN OF THE CORNELL UNIVERSITY COLLEGE OF LAW

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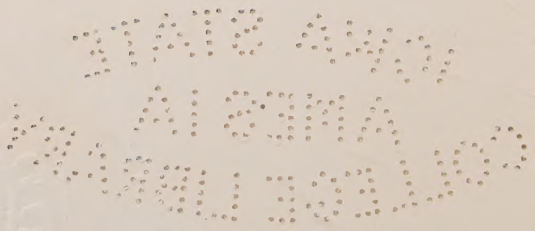

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PREFATORY NOTE

An effort has been made in this book to state as concisely and clearly as possible the leading and fundamental principles of business law, and in place of extended abstract explanations of them to substitute simple concrete examples showing them in their actual application to business transactions. In order that the conclusions drawn in these examples may be verified and not rest upon mere conjecture, the examples have for the most part been taken from cases decided in the courts. At the end of each chapter are given a number of concrete problems without the conclusions, intended to afford an exercise in the application of the principles drawn from the text and the examples. These also have been taken mainly from the decided cases. The drill in the examples and problems should be constant and thorough, and will be found far more interesting and instructive and far better calculated to develop intelligent thinking and reasoning than the memorizing and repeating of abstract dogmatic statements.

The arrangement of the book has kept in view a logical analysis and unfolding of the subject. But if for any reason it should be thought desirable to deal with negotiable instruments earlier in the course, it would do equally well to interchange Parts II and III, giving the latter first.

Should the book prove too extended for the time allotted, Parts V and VI may be omitted, although it would be well to cover, if possible, the chapter on partnership. The last three chapters do not fall clearly within the scope of business law, and for this reason and because it has been the object not unduly to extend them, the examples and problems have been for the most part omitted and numerous facsimiles of formal

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documents substituted. While these chapters deal with somewhat technical matters, the subjects involved are of great importance to all who have property interests.

The glossary of legal terms should be constantly referred to in order that the nomenclature of the law may be correctly understood. While the glossary has been made as complete as practicable, it would be well to supplement it by a good law dictionary in which more extended definitions and explanations may be found.

The work is based necessarily upon the common law. While the nature of statutory changes has been indicated, the precise provisions of statutes are rarely given because these vary so widely in the different states that such a course would prove misleading. The difficulties of an accurate statement of the statutory law in a book of this size are in fact insurmountable. Should the teacher be fortunate enough to secure the coöperation of a local attorney, some progress in this direction might be made.

It will be found in setting examinations that concrete problems are better calculated to disclose the practical value of the student's work than questions calling mainly for definitions, rules, or abstract statements.

E. W. H.

Cornell University
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July 3, 1905

TABLE OF CONTENTS

CHAPTER I

PRELIMINARY TOPICS

Business Law and Cognate Subjects

SECTION		PAGE
1.	Business	1
2.	Law	1
3.	Business law	3
4.	Divisions of the law	3
5.	Property	4
6.	Legal obligations	5
7.	Courts	7
8.	Procedure	8
9.	Scope of this work	9

Part I

THE PRINCIPLES OF CONTRACT

CHAPTER II

FORMATION OF CONTRACTS

10.	Definition of contract	13
11.	Essentials of enforceable contract	14

I. Agreement

12.	Contracts begin in agreement	14
13.	Classes of agreements	15
14.	Agreements originate in some form of offer and acceptance	16

SECTION

II. Competent Parties PAGE

15. Infants 19
16. Insane persons 21
17. Married women 21

III. Consideration

18. Necessity of consideration 22
19. The consideration need not equal the promise in value . . . 23
20. A past consideration will not support a promise 24
21. The consideration must be legal 25

IV. Form: Writing; Seal

22. Statute of Frauds 25
23. Contracts under seal 28

V. Legality of Object

24. Contracts made illegal by statute 30
25. Wagering contracts 31
26. Contracts illegal at common law 33
27. Effect of illegality upon contracts in which it exists . . . 34

VI. Reality of Consent

28. Mistake 36
29. Fraud and misrepresentation 38
30. Duress 39
31. Undue influence 39

CHAPTER III

OPERATION AND DISCHARGE OF CONTRACTS

I. Liabilities and Rights of Third Parties

32. Liability of third parties 48
33. Rights of third parties 49

II. Assignment of Contracts

34. Assignment by act of the parties 49
35. Negotiability of certain contracts 50
36. Assignment by operation of law 51

III. Discharge of Contracts

SECTION PAGE
37. Discharge by agreement including performance 52
38. Discharge by impossibility of performance 54
39. Discharge by breach 56
40. Remedies for breach of contract 58

IV. Discharge in Bankruptcy

41. Insolvency laws not discharging debtor 59
42. Bankruptcy laws discharging debtor 59
43. The state insolvency laws 60
44. National Bankruptcy Law of 1898 60

Part II

PARTICULAR CONTRACTS CONCERNING GOODS

CHAPTER IV

SALES OF GOODS

I. The Contract

45. Definition and analysis 65
46. Statute of Frauds 70

II. The Title

47. When does title pass? 74
48. Specific or ascertained goods 75
49. Unascertained goods 77
50. Who has the risk? 79

III. Performance

51. Duties of the seller 80
52. Duties of the buyer 81

IV. Warranties

SECTION PAGE
53. Definition and classification 81
54. Express warranties 82
55. Implied warranties 83
56. The rule of *caveat emptor* 85
57. Remedies for breach of warranty 86

V. Remedies

58. Rights of unpaid seller against the goods 87
59. Rights of unpaid seller by way of action for breach of contract . 90
60. Remedies of the buyer 90

CHAPTER V

BAILMENT OF GOODS

61. Definition and distinctions 96
62. Classification of bailments 97

I. Bailments solely for Benefit of One Party

63. Bailments for sole benefit of bailor 100
64. Bailments for bailee's sole benefit 102

II. Mutual Benefit Bailments

65. Pledge or pawn 104
66. Bailee hires an article of bailor 106
67. Bailor engages bailee to keep, repair, or transport an article . . 108

III. Special Cases of Bailment for Keeping or Transportation

68. Innkeepers 111
69. Common carriers of goods 113

IV. Cases not Strictly of Bailment

70. Public carriers of passengers and baggage 122
71. Telegraph and telephone companies 124

CHAPTER VI

INSURANCE CONTRACTS

SECTION PAGE
72. Nature and kinds of insurance 128
73. Kinds of policies 129
74. Definitions 129
75. Characteristics 131
76. The insured must have an insurable interest 133
77. The contract of insurance is one requiring the highest good faith 134
78. Warranties 136
79. Statutory or standard policies 138
80. Marine insurance 138

PART III

PARTICULAR CONTRACTS CONCERNING CREDITS

CHAPTER VII

CREDITS AND LOANS

81. Capital and credit; money and exchange; payment . . . 143
82. Interest and usury 148
83. Banks 150
84. Bank deposits 151
85. Loans and discount; security 152

CHAPTER VIII

THE CONTRACT OF GUARANTY

86. Guaranty defined 157
87. A guaranty must be in writing 158
88. Consideration 159
89. Notice of acceptance by guarantee 159
90. Notice to guarantor of the default of the principal . . . 159
91. What will discharge the guarantor 160
92. Guarantor's liability 163
93. Guarantor's remedies 164

CHAPTER IX

NEGOTIABLE INSTRUMENTS

I. Nature and Characteristics

SECTION		PAGE
94.	Kinds of negotiable instruments	168
95.	Characteristics of negotiable instruments	170
96.	Definitions	172
97.	Negotiable Instruments Law	179

II. Form

98.	What a negotiable instrument must contain	180
99.	What a negotiable instrument must not contain	182
100.	Nonessentials	182
101.	Effect of blanks	183
102.	Delivery	184

III. Negotiation

103.	Negotiation; indorsement; delivery	185
104.	Holder in due course	187
105.	Rights of holder in due course	189

IV. Maker's and Acceptor's Contract

106.	Maker's contract on a promissory note	191
107.	Acceptor's contract on a bill of exchange	191
108.	Presentment of bill of exchange for acceptance	194

V. Drawer's and Indorser's Contract

109.	Drawer's contract on a bill of exchange	195
110.	Indorser's contract on a bill or note	195
111.	Presentment for payment	198
112.	Notice of dishonor	200
113.	Protest	204
114.	Checks	208
115.	Position of indorser after liability is fixed	209

Part IV

AGENCY: THE CONDUCT OF BUSINESS THROUGH REPRESENTATIVES

CHAPTER X

PRINCIPAL AND AGENT

SECTION PAGE
116. Agency: its divisions and problems 215

I. Appointment of Agents

117. Who may appoint agents 217
118. Who may be an agent 219
119. Form of appointment 219
120. Ratification 219
121. Agency by necessity 222
122. Termination of agency 222
123. Irrevocable agencies 223

II. Obligations of Principal and Agent to Each Other

124. Obligations of principal to agent 224
125. Obligations of agent to principal 225

III. Liability of Principal to Third Parties

126. General rules 227
127. Agent's apparent authority 228
128. Agents following customary calling 230
129. Undisclosed principal 231
130. Frauds by agent 233

IV. Liability of Agent to Third Parties

131. Where agent alone is liable 233
132. Where both principal and agent are bound 234

CHAPTER XI

MASTER AND SERVANT

I. Injuries to Third Persons

SECTION PAGE
133. Negligent torts by servants 238
134. Willful torts by servants 238

II. Injuries to Servants

135. Injury to one servant by another 239
136. The master's nonassignable duties 240

Part V

BUSINESS ASSOCIATIONS

CHAPTER XII

PARTNERSHIPS AND JOINT-STOCK COMPANIES

137. Forms of conducting business 243

I. Partnerships

138. What constitutes a partnership 244
139. Rights and duties of partners as to each other 247
140. Powers of partners 247
141. Liabilities of partners 249
142. Rights and remedies of creditors 249
143. Dissolution 250

II. Joint Stock Companies

144. How distinguished from ordinary partnerships 252
145. How like ordinary partnerships 252

CHAPTER XIII

CORPORATIONS

SECTION PAGE
146. Definition and classification 256
147. How a corporation is formed 257
148. Members 258
149. Directors 260
150. Officers and agents 261
151. Powers of a corporation 262
152. Stockholders' rights 264
153. Liability of stockholders 265
154. Reports of corporations 265
155. Receivers of corporations 266
156. Dissolution of corporations 266

PART VI

PROPERTY IN LAND AND MOVABLES

CHAPTER XIV

REAL PROPERTY

I. ESTATES IN REAL PROPERTY

157. Meaning of the term "property" 269
158. Estates in land; duration 272
159. Future estates in land: reversions and remainders . . . 275
160. Estates held jointly or in common 276
161. Equitable estates: trusts 278

II. LAND: ITS CONSTITUENTS, GROWTHS, AND FIXTURES

162. Extent of ownership: soil, air, minerals, waters . . . 278
163. Vegetable products 279
164. Fixtures 280

III. RELATIVE RIGHTS OF ADJOINING OWNERS

165. Fences: cattle trespass 282
166. Air and waters; support of land 282
167. Easements 283

IV. Transfer of Interests in Lands

SECTION PAGE
168. Contract of sale 283
169. Conveyances 284
170. Wills 286
171. Descent to heirs 289
172. Adverse possession 291

V. Mortgages and Liens

173. Mortgages of real property 291
174. Liens on real property 296

VI. Landlord and Tenant

175. The lease and its covenants 296
176. Defects, repairs, and waste 299
177. Assignment and subletting 300
178. Rent and remedies for nonpayment 300
179. Termination of lease 301

CHAPTER XV

PERSONAL PROPERTY

I. Classification: Kinds and Estates

180. Classification 303
181. Property in animals 304
182. Trademarks; good will; names 304
183. Estates in personal property 306

II. Acquisition and Transfer

184. Acquisition by occupancy and by finding lost property . . 306
185. Accession and confusion 307
186. Transfer by gift 309
187. Other modes of transfer 311

Glossary 315
Index 323

ELEMENTS OF BUSINESS LAW

CHAPTER I

PRELIMINARY TOPICS

Business Law and Cognate Subjects

1. Business. Business concerns itself with property, credit, and services, and with contracts pertaining to these things.

The term business embraces every kind of industrial activity by which men acquire, manufacture, or otherwise produce property; by which they sell or transfer it; by which they store, transport, or insure it; by which they borrow or lend money and give or secure credit; by which they combine with others to these ends; and by which they furnish or obtain services in these and similar enterprises. This is by no means an exhaustive list of commercial operations, but it indicates the variety and extent of those human activities that pass under the name of business.

2. Law. The term law includes all those rules by which courts are controlled in the administration of justice. The same rules must also govern men in their relations to each other, because if they be violated, the courts will either give reparation to the injured party or refuse to aid the one who has violated them.

Rules of law are of two kinds, — first, those that have been worked out by the courts themselves in deciding actual cases brought before them by litigants, and second, those enacted by the legislatures. The first are known as the common law, and

the second as statute law. The common law is sometimes called the unwritten law, and statute law is sometimes called the written law.

1. *Common law.* The common law is therefore the law declared by judges in the decision of cases. It rests primarily upon custom, because in deciding cases the judges seek to give effect to the prevailing customs of the people in their relations and dealings with each other. But when a point of law is once decided, subsequent judges in the same jurisdiction follow it as a precedent, and the point is said to be decisively settled. This is known as the doctrine of *stare decisis*, — the doctrine that courts must stand by decided cases, uphold precedents, and maintain former adjudications. With the lapse of time, therefore, the greater number of the ordinary questions that may arise have been thus settled and the common law established. The rules must be sought in the printed reports of the decisions of the courts.

2. *Statute law.* Statute law consists of the enactments of legislatures. These may be for the purpose of changing some rule established by the courts when, for example, the development of society makes the continuance of the old rule inexpedient, or for the purpose of codifying into a brief statute the rules scattered through hundreds or even thousands of volumes of reported cases. The whole law of negotiable instruments has been thus codified in England and in many of our American states (see sec. 97 *post*).

In any state, therefore, one must consult for the law the statutes of that state and the reports of its courts. In some states the reports are very numerous. For example, there are in New York upwards of one thousand volumes and in Massachusetts nearly two hundred volumes, and in all the states combined over five thousand volumes. A statute or decision is not binding except in the state where enacted or rendered. Hence it follows that the law may be one way in Massachusetts and just the opposite in New York. As we have the federal Congress and courts and forty-five state legislatures and courts, not to mention territories and dependencies, it will be seen that the American law may present many diverse enactments or decisions upon the same question. This is what makes it very difficult to present in this country a statement of the law which is correct for every jurisdiction.

3. Business law. Business law is that portion of the general law which governs business transactions. While the term is frequently used as if it denoted a distinct body of law susceptible of accurate definition, it is in reality a term of vague meaning. One engaged in business transactions may be confronted with legal questions involving almost any topic of the law, and hence might need advice from an expert or might in simple cases be able to solve the difficulty for himself. The most that any law book for business men can well undertake to do is to present the elementary principles governing the ordinary business transactions, leaving for lawyers the more intricate or technical problems. The chief aim of such a book should be to inform the business man how to keep out of difficulties, rather than to enable him to extricate himself after he is once involved.

Business law is, therefore, merely such a selection from the general body of the law, and especially the law of contract, as a particular author may think it profitable for a business man to know.

4. Divisions of the law. The law may be divided into two great branches, public law and private law.

1. *Public law.* Public law includes those topics with which the state, that is, the public as a whole, is especially concerned, namely: (*a*) international law, or the law governing the relations of one nation to other nations; (*b*) constitutional law, or the fundamental law governing a nation or state in its relations to its citizens; (*c*) criminal law, or the law by which the public protects itself against crimes and offenses prejudicial to its well-being; and (*d*) administrative law, or the law under which governmental affairs are carried on, as tax laws, highway laws, and the like.

2. *Private law.* Private law includes those topics with which individuals are particularly concerned in their private relations. These are very numerous but may be roughly grouped under three main heads, namely: (*a*) the law of property, including acquisition, ownership, possession, security, alienation, descent, and the like; (*b*) the law of obligation, including contracts, torts, trusts, and the like; and (*c*) the law of procedure, or the

law by which cases are brought into courts and conducted to trial and judgment.

The topics treated under the head of business law are those involving either the law of property or the law of obligation. The acquisition and disposition of property, the making and performing of contracts, constitute the major part of a business enterprise.

5. Property. Property consists in the ownership of material objects, or the ownership of some right in or to a material object, or the ownership of some right against a person, or the ownership of some immaterial right to be exercised to the exclusion of others. Material objects are either immovable, like land, or movable, like coin, cattle, or merchandise. One may own and possess these things, or he may own a right in them, as when he has a right to cross another's lands or a right to sell another's goods pledged to him for a debt. Immaterial property may consist in a right granted by statute or usage to the exclusion of others, as a right to a patent or to a trademark; or it may consist of a right against a person, as a right to compel him to pay a promissory note or to pay damages for a trespass to property.

The law regards property as either real property or personal property.

1. *Real property.* Real property consists of any estate or interest in lands, except a leasehold estate for years or a mortgage or lien. There are two such estates: an estate of inheritance, or, as it is often called, an estate in fee, which is an estate that descends to the owner's heirs; and an estate for life which terminates at the death of the owner or of some other designated person (see sec. 158 *post*).

2. *Personal property.* All other property is personal property. This includes (1) chattels real, that is, leasehold interests in lands; (2) chattels personal, that is, all other kinds of property consisting of the following classes: (*a*) corporeal movable objects; (*b*) incorporeal rights or privileges, like patents, copyrights, trademarks, and good will in a business; (*c*) rights of action against persons, called *choses* (i.e. things) in action.

The kinds of property with which business is chiefly concerned are corporeal movable objects and choses in action. The former are goods, wares, and merchandise; the latter are negotiable instruments, stocks and bonds, mortgages and liens, and debts in general.

6. Legal obligations. Legal obligations are those which the law enforces. They arise either by agreement or by the policy of the law, independent of an agreement.

1. *Contract.* An agreement enforceable at law we call a contract, and the failure or refusal to carry out the agreement we call a breach of contract.

Example: 1. A agrees with B that A shall sell and B shall buy A's bicycle for $30. This is a contract. If either party refuses to carry out his part of it, the other has a case at law for damages.

Contracts have to do with a great variety of interests, and many special kinds of contracts may be enumerated, such as contracts of sale, contracts of bailment, contracts of carriage, contracts of insurance, contracts of partnership, contracts of guaranty, contracts for the loan of money, and the like.

2. *Tort.* The obligations fixed by private law independent of agreement have no specific names, but the breach of any of these obligations is called a tort, which is simply the French word for wrong. Many of these torts have specific names.

Examples: 2. A strikes B in anger. A has committed the tort called assault and battery.

3. C goes without permission on D's land. C has committed the tort called trespass.

4. E speaks false and malicious words derogatory to F's character. E has committed the tort called slander. If E writes the words, the tort is called libel.

5. G drives so carelessly in the street as to run into and injure H's carriage. G has committed the tort known as negligence.

In each of the above cases the wrongdoer was under an obligation fixed by the law not to infringe the personal security or property rights of another to his damage, and to use due care for the safety of others and their property. The violation of this obligation constitutes the tort.

Where, in the formation of a contract, one party knowingly makes a false representation to the other, a tort is committed. Where, after a contract is made, a stranger to it induces one of the parties to break it, a tort is also committed.

Examples: 6. A wishes to sell sheep to B. He tells B that they are sound and healthy. He knows they are diseased. B buys the sheep and afterwards discovers that they are diseased. (*a*) There is a contract between A and B. (*b*) There is a tort, known as deceit, committed by A.

7. A agrees to work for B. X, knowing this, induces A to break the contract. X has committed a tort which has no very specific name. It is called "inducing breach of contract," or, in this form of contract, "enticing away a servant."

3. *Quasi-contracts.* In certain cases where there is no true contractual agreement, the law, by reason of some act or situation of a party, imposes an obligation upon him and gives a remedy against him, as if, in fact, his obligation did arise from agreement. In order to prevent injustice and to give an efficient remedy, the law indulges in such cases the fiction that a promise was made, and permits an action in contract. These cases are called quasi-contracts because they are like contracts, although not true contracts.

Examples: 8. A steals B's money. B may recover the money in a contract action, there being by fiction of law an implied promise to repay it.

9. C by mistake pays D more than he owes. C may recover the excess in a contract action. The law implies a promise by D to return the overpayment.

10. E is a lunatic, known to be one, and incapable of making a contract. F furnishes E with necessary food. F may recover the reasonable value of the food in a contract action. The law creates the promise of the lunatic to pay for necessaries.

4. *Trusts.* A trust is an obligation of one who has the legal title to property to account for it to one who has the beneficial or equitable interest. Trusts are not recognized or enforced by the courts known as the law courts, but by the courts known as the equity or chancery courts. These courts are explained in the next section. Law courts recognize only legal titles and interests, but equity courts recognize equitable titles and interests.

Example 11. B conveys or wills his farm in trust to C to receive the rents and income and pay the same over to D. This is a trust. D's rights are not recognized by the law courts, but the equity courts recognize and enforce D's rights and compel C to account to D for the rents and income.

The so-called "trusts" referred to in current economic discussions are not now trusts in the above sense, but are simply monopolistic combinations. Originally stockholders in various corporations placed their shares in trust with a committee, and the total profits of all the corporations were divided among the various stockholders *pro rata*, thus constituting a real trust. But it is now the custom to unite all the corporations into one corporation, in order to eliminate competition. This does not create a true trust, but the old name continues to be used to describe the new monopolistic device.

7. Courts. The courts of a particular state may consist of law courts and equity courts, although in modern times these are often combined. The United States has also an admiralty court, or rather a court with admiralty jurisdiction.

1. *Law courts.* Law courts are organized tribunals for the trial of cases and the hearing of appeals. Each state has trial courts and at least one court to which appeals may be taken. Trial courts consist of a judge and a jury, with attendant officers. Appellate courts consist of a bench of judges without a jury.

The trial courts are generally the following.

(*a*) A court of general jurisdiction is one before which most cases may be brought. This is usually called a circuit court, because the judges go on circuit from place to place to hold trials.

(*b*) Courts of limited or local jurisdiction are for the trial of smaller cases; such are county courts, city courts, and courts held by justices of the peace.

(*c*) Courts for the administration of the estates of deceased persons are called the surrogate's court, probate court, orphans' court, etc.

The appellate courts are those to which appeals are taken from the trial courts. Most states call the appellate courts the Supreme Court. In New York, however, the highest appellate court is called the Court of Appeals, and the trial court of general jurisdiction is called the Supreme Court. Owing to the

large amount of appellate work, some states have an intermediate appellate court. In New York this is called the Appellate Division of the Supreme Court.

In the federal jurisdiction the trial courts are the District Court and the Circuit Court; the intermediate appellate court is the Circuit Court of Appeals, and the highest appellate court is the Supreme Court.

2. *Equity courts.* Side by side with the common law courts there grew up in England a separate court known as the equity court or the chancery court. This court consisted of a judge without a jury, and was intended to give relief in hard cases where, by the somewhat rigid rules of the common law courts, none could be had. A body of rules or doctrines evolved by this court is known as "equity." Equity consists, therefore, of the rules and doctrines by which equity courts are controlled in the administration of justice.

In a few of our states such separate equity courts still exist; but generally the powers of a common law court and of an equity court have been combined in one court which administers both law and equity. In such case the court of general jurisdiction is both a common law and an equity court. If one wished to sue for breach of contract or for an accounting for a trust, he would go before the same court: in the contract case the judge with a jury would administer law rules; in the trust case the judge without a jury would administer equity rules.

3. *Admiralty courts.* Admiralty courts administer still a different law, known as the admiralty law or law of the sea. They have to do with vessels and their cargoes and crews upon public navigable waters. There is no separate court of admiralty in the United States; the District Courts of the United States have admiralty jurisdiction and administer admiralty law. State courts have no admiralty jurisdiction. An admiralty court consists of a judge without a jury. The judge is the trier of the facts as well as the administrator of the law.

8. Procedure. A case is brought before a court by pleadings. The plaintiff makes a complaint or declaration, setting out his

cause of action, and a summons to appear and answer this is served upon the defendant. The latter makes an answer to the complaint. Upon these documents, or others which may be allowed, the issue is framed, that is, the question in dispute is made clear.

At a time appointed the parties go before the court with their attorneys and witnesses and give evidence to sustain their contentions. The jury is instructed by the judge as to the law of the case, and renders its verdict upon the facts proved and the instructions received. The court enters a judgment in accordance with this verdict.

The defeated party may appeal from this judgment. His attorney prepares a transcript of the evidence, and with this, upon notice to his adversary, goes before an appellate court of judges and asks to have the judgment reversed. Argument by both parties is heard by the appellate court. If the court finds a substantial error in the rulings or instructions of the trial judge, or finds the verdict unsupported by the evidence, it may reverse the judgment and order a new trial. Otherwise it affirms the judgment.

If a new trial is ordered, the same procedure is repeated except that no new pleadings are necessary.

When a final judgment is entered the successful party is entitled, besides any judgment for a fixed sum, to such costs as may be allowed by law. If the judgment is not paid, he may issue an execution against the property of his adversary, and the sheriff may levy on the property and sell it to satisfy the judgment. In every state a certain amount of property is exempt from levy and sale upon judgments. These exemption laws are intended to secure to debtors certain household necessities, tools of a trade, and often a homestead.

9. Scope of this work. A business man has to deal mainly with property and contracts. He can hardly carry on business without dealing directly or indirectly with some species of property, and very often the purchase and sale of property is the chief part of his business. He cannot carry on business at all without making contracts, — often scores or hundreds of

contracts in a single day. Accordingly these two topics of the law are those with which the business man should be especially familiar. He needs to know what constitutes a binding contract, what obligations arise upon its completion, and what steps are necessary to its legal performance. While he can hardly hope to know technically about torts, he ought, if an employer of workmen, to know what obligations he undertakes as concerns their safety, and what liabilities he incurs by failing to use due care to have the instrumentalities of his business in a safe condition. It will be the object of this work to state some of the more important legal rules connected with these subjects.

We shall first consider the formation of contracts, that is, what constitutes a binding and enforceable agreement. This will be followed by a discussion of the operation of contracts, — that is, the rights arising from them, — and the discharge of contracts, — that is, how they are ended and the rights under them terminated.

These general principles will be followed by a discussion of the particular contracts concerning personal property, — namely, the sale, bailment, carriage, and insurance of goods, — and the particular contracts concerning credit, — that is, contracts creating debts, contracts of guaranty, and contracts contained in commercial paper.

Agency, the means by which one makes contracts through an employee, follows the discussion of contracts and their special forms. Here also is an excursus upon the subject of master and servant.

Business associations, such as partnerships and corporations, are next discussed.

Finally, there is a concise treatment of the subject of property, real and personal, in order to bring together some topics not treated under the head of contract.

REVIEW QUESTIONS

SECTION 1. With what is business concerned? What is included in the term business? Enumerate all the different kinds of business conducted on a specified block of a business street in your city or village.

2. Define law; common law; statute law. Who declares the common law? Where is it found? What is it based upon? What is the force of precedents? What are the two objects of statute law? Why is the law more difficult to state in America than in England?

3. Explain "business law." From what branch of the law is it mainly taken?

4. Name two main divisions of the law. What does public law include? What does private law include?

5. What is property? What objects and rights constitute property? What is real property? Is an estate for years real property? Is a mortgage? What two kinds of personal property? What three kinds of personal chattels? With what two kinds of property is business chiefly concerned?

6. What are legal obligations? How do they arise? Distinguish between contract obligation and tort obligation. Illustrate. Name and illustrate some torts. Explain and illustrate quasi-contracts. Explain and illustrate trusts. Explain the meaning of the term "trust" in economic discussions.

7. What is a court? a trial court? an appellate court? Describe three kinds of trial courts. Name the federal courts. What are equity courts? Do they have a jury? What is equity? What are admiralty courts? What cases do they hear? What is the United States admiralty court?

8. Describe the steps in bringing a case before a court and to trial and judgment. Explain the process of an appeal. How is a judgment enforced? What are exemptions?

PART I

THE PRINCIPLES OF CONTRACT

CHAPTER II

FORMATION OF CONTRACTS

10. Definition of contract. A contract is an agreement between two or more persons for the breach of which a court of law will give damages. There are many agreements for the breaking of which no damages can be had, either because the agreement contemplates no legal relations or because it ends in a legal relation that is enforceable only in a court of equity.

Examples: 1. B agrees to sell a watch to C for $25, and C agrees to pay B $25 for the watch. This is a contract. If B refuses to deliver the watch, C has an action at law against B for damages. If C refuses to take the watch and pay the $25, B has an action at law against C for damages.

2. D and E mutually agree that they will meet each other at a designated place and go to a football game together. This is not a contract. It contemplates social, not legal, relations.

3. F agrees with G to take G's property and invest it, receive the income, pay the income to G during his life, and divide the principal among G's children after G's death. This creates a trust. If F failed to pay over the income, G's remedy would be by suit in equity for an accounting, not at law for damages. Since the agreement is not enforceable at law, it is not a contract.

The agreement may give one party the right to demand that the other do something (affirmative contract), or it may give one party the right to demand that the other forbear from doing something (negative contract), or the same agreement may give both rights.

Example 4. B sells his dry goods business to C for $5000, and agrees not to engage in that business again in the same city. C acquires two rights: first, the right to have B transfer to him the business, and second, the right to have B forbear to enter into competition with him. For the breach of either of these terms C has an action at law for damages. (For the breach of the second he might also secure an injunction in equity, because the damages he would suffer from B's competition are so uncertain that the legal remedy is deemed inadequate; but since he may have damages at law, the agreement is a contract. Equity courts sometimes specifically enforce contracts.)

The persons making the agreement may be two or more, but they are so divided as to constitute two groups of persons.

Example 5. B sells his horse to C and D. C and D resell the horse to E, F, and G. In the first contract B is on one side and C and D jointly on the other. In the second contract C and D are on one side and E, F, and G on the other.

In some cases three parties make among them three contracts, which constitute what is called a novation.

Example 6. A owes B $100. B owes C $100. The three meet and agree that A shall pay C. B's claim on A is extinguished. B's obligation to C is extinguished. A new obligation from A to C is created. Thus there are, in effect, three contracts.

11. Essentials of enforceable contract. In order that a contract shall be enforceable, that is, one for the nonperformance of which the law will give damages, the following elements must be present: (1) an agreement; (2) by competent parties; (3) upon sufficient consideration; (4) in some cases, evidenced in a particular form; (5) for a legal object; and (6) made without mistake, fraud, undue influence, or duress.

I. AGREEMENT

12. Contracts begin in agreement. All true contracts begin with an agreement. By agreement is meant the meeting of the minds of the contracting parties in a common assent to the same definite conclusion. But the state of the mind of a party must be judged by what he says and does. He cannot definitely agree to a thing and afterwards escape upon the plea that he

misspoke himself or did an act manifesting agreement which he did not intend to do.

Examples: 1. B leads out a colt and says to C, "I will sell you this colt for $40." C answers, "I will take him at that price." B discovers he has led out a colt he did not intend to sell. B is bound.

2. B writes, "I will sell you 10,000 bushels of wheat at 80 cents a bushel." C replies, "I will accept your offer." B asserts he intended to write, and thought he had written, "1,000 bushels." B is bound to deliver 10,000 bushels or pay damages for nondelivery.

Agreements must be definite enough to enable a court to ascertain and enforce the terms. Indefinite and uncertain agreements are unenforceable, because the court will not make or complete contracts for parties.

Examples: 3. "I will sell you one hundred acres of land for $1000." "I accept." This is too uncertain because no definite one hundred acres are indicated.

4. "I will sell you one hundred bushels of potatoes for $60." "I accept." This is definite enough because no particular one hundred bushels need be specified.

5. "I will give as much for your horse as A says he is worth." "I accept." This is definite enough because a way of ascertaining the price has been agreed upon.

6. "Send me one hundred bushels of potatoes." The potatoes are delivered. This is enough. The market price is understood.

13. Classes of agreements. Agreements leading to legal obligations serve three purposes, namely, to create rights, to transfer rights, and to extinguish rights. An agreement which creates a right is called a contract. An agreement which transfers a right is called an assignment. An agreement which extinguishes a right is called a release or discharge. All are in fact contracts.

Examples: 1. A and B agree that A shall sell and deliver his horse to B for $100, which B agrees to pay sixty days after such delivery. This is a contract. When A delivers the horse he has performed his part, and has a right against B to demand the $100 in sixty days.

2. A agrees with C to transfer to C this right against B in exchange for a cow. This is an assignment by A to C of A's right against B to the $100.

3. C, who now owns the right against B, agrees with B to accept and does accept a buggy as the equivalent of the $100. C thereby discharges the right against B.

14. Agreements originate in some form of offer and acceptance. An offer is an expression by one person of his willingness to become a party to an agreement in accordance with terms expressed or indicated. Acceptance is the expression by the person to whom the offer was made of his willingness to do or forbear from doing what the offeror requires.

The offer may be of a promise or of an act. The acceptance may be the giving of a promise or the doing of an act. No words need be used. We may have a contract in which there is a promise for a promise, that is, an outstanding promise on each side; this is called a bilateral executory contract. Or we may have a contract in which there is a promise outstanding on one side and the act performed on the other; this is called a unilateral executory contract. When both parties have fully performed the contract it is said to be an executed contract. When a promise is put into words it is said to be an express promise; when it is inferred from acts or conduct it is called an implied promise.

Examples: 1. Promise for promise: "I will work for you for one month for $30." "Agreed." There is an outstanding promise on each side before any act is done.

2. Promise for act: "I will pay you $10 if you find and return my lost watch." The offeree finds and returns the watch. The contract is then complete. There is an outstanding promise on one side.

3. Act for promise: A newspaper is sent regularly to a person who takes and reads it as often as it reaches him. The offer is in the sending of the paper. The promise to pay for it is implied from the receiving and using it.

There are certain rules governing offer and acceptance that are often applied in order to determine whether an agreement has been reached. These will be briefly enumerated.

1. *The offer must be communicated to the offeree.* This, as we have seen, may be by oral or written words or by acts and conduct. However expressed, the offer must actually reach the offeree or there can be no acceptance by him. The offer may be made to all the world but must be accepted by some definite person.

Example 4. B publishes in a newspaper an offer of $10 reward for the return of his lost watch. C returns the watch, not knowing that such a

reward has been offered. Afterwards C learns of the offer and claims the reward. He cannot compel B to pay it, because the act was not done relying upon the offer or with knowledge of it. (But one or two states allow a recovery upon no very well defined principle.)

2. *The acceptance must be either communicated or else actively manifested in a manner contemplated by the terms of the offer.* Mental determination to accept is not enough; the mental intent must be unequivocally indicated. If the offeror has stated how it shall be indicated, the offeree may do what is required without actually communicating with the offeror; but stipulating that silence shall be deemed an acceptance will not make it so, since the offeror cannot impose on the offeree the obligation to speak. Speech or action is necessary. When an offer is sent by mail, it is implied that the offeree may indicate assent by mailing an acceptance; and the contract is complete when the letter is mailed, although it may never be received.

Examples: 5. B writes C: "I will give you $100 for your horse. If within ten days I do not hear from you to the contrary, I shall consider that you accept." No answer is returned to B. There is no contract even though C has mentally determined to accept. Mere silence does not give consent. If B had specified some act that C was to do to indicate assent, the doing of the act with the intent to accept would be enough.

6. D advertises that if any one buys and uses his medical remedy as directed and afterwards contracts any disease caused by taking cold, he will pay to such person $100. E buys and uses the medicine as directed and afterwards contracts a cold and disease caused by the cold. D is held liable to pay E the $100. E's acceptance of D's offer is manifested by buying and using the medicine as directed, with knowledge of the offer. It is not necessary for E to communicate his acceptance to D.

7. F posts a letter to G, offering to sell his horse to G for $150. G receives the letter on Monday, and on Tuesday posts a letter directed to F, accepting the offer. The letter is lost in the mails and never reaches F, who on Friday sells his horse to H. F is liable to G in damages for breach of contract, for the contract was completed by acceptance as soon as G posted his reply. If F wishes to guard against this, he should say in his letter, "Upon receiving your acceptance the sale will be closed," or use some similar phrase especially requiring that the acceptance should be actually received. By using the mails the offeror impliedly invites the offeree to use the mails, with the result indicated. If F's offer were personal, there would ordinarily be no implied invitation to use the mails for an acceptance; but there might be an invitation either expressed or gathered from

circumstances, as, if G lives at a distance and is told by F to go home, think it over, and let him know, G may use the mails, and his acceptance is complete when the letter containing it is duly posted.

3. *The acceptance must be absolute and accord with the terms of the offer.* If the offeree qualifies his acceptance in any way, it is not an acceptance but merely a counter offer to be accepted or rejected by the original offeror. A qualified acceptance amounts to a rejection of the offer, which cannot thereafter be accepted so as to bind the offeror.

Example 8. B offers his horse to C for $150. C replies, "I will take the horse at $125." B refuses. C then says, "I will take him at $150." B refuses this. C sues B for breach of contract. C will fail. C's acceptance at $125 was a rejection of the offer at $150, and the offer was at an end.

4. *An offer may be varied or revoked before acceptance.* An unaccepted offer creates no legal rights. The offeror may vary or revoke it at any time before the offeree accepts it. If, however, the offer is under seal, or if the offeree has paid a consideration for the option to accept or reject, the offer is in the form of a contract and cannot be varied or revoked. An acceptance of the offer concludes the contract and it is then irrevocable. But there must in fact be an offer. Merely sending out a circular of prices, or advertising prices in a newspaper, is not an offer, but merely an invitation to deal with the advertiser.

Examples: 9. B offers C his horse for $150 and gives C twenty-four hours in which to accept. In an hour B withdraws his offer; but C, an hour later, accepts. There is no contract. There was no consideration for B's promise to give C twenty-four hours to accept, and B may revoke his offer before C actually accepts.

10. D gives E an option to take 1000 bushels of wheat on September 1, at 90 cents a bushel, for which option E pays D $40. D withdraws the option before September 1, but on that day E accepts and demands the wheat. D is liable to E for refusal to deliver. The offer is irrevocable.

5. *The offeree must have notice of the revocation.* An offeree may accept within the time fixed, or, if none be fixed, within a reasonable time, unless he has notice before his acceptance that the offer is revoked. It seems that the notice need not

necessarily come from the offeror, it being sufficient that the offeree actually learns from any source that the offer is revoked.

Examples: 11. B writes C, "I will sell you my horse for $150." The next day B writes C, "I withdraw the offer." The following day, and before receiving the letter containing the withdrawal, C posts an acceptance. The contract is complete, since C had no notice of the withdrawal before acceptance, and acceptance is complete when the letter is mailed. Revocation is not complete until received.

12. D offers E his horse at $150 and gives E two days to accept. The next day D sells the horse to X, who tells E the horse is his (X's). E then accepts. There is no contract. E knew when he accepted that the offer had been revoked by a sale to X.

6. *An offer may lapse without express revocation.* If a time is fixed, the expiration of the time revokes the offer. If no time is fixed, the offer lapses after the expiration of a reasonable time; what is a reasonable time must depend upon the circumstances of the case. An offer lapses by the death of either party.

Examples: 13. On June 1 B offers C $50 for a cow. C accepts the offer on August 1. This is not a reasonable time where the parties live near each other. Even a week might be too long.

14. D writes E, "I will sell you my farm for $3000." Before E posts his acceptance D dies. The offer is revoked by D's death. But if E posts his acceptance before D's death the contract is binding upon D's estate.

II. Competent Parties

15. Infants. An infant is a person under the age of twenty-one. In many states women become of age at eighteen, and in some they are of age at eighteen or even younger, if married.

A person attains his majority on the day preceding his twenty-first birthday, that is, on the last day of his twenty-first year. If one's birthday is November 8, he can vote or make binding contracts on November 7.

Contracts made during infancy are voidable[1] at the infant's option, exercised either during his infancy or after he attains

[1] It is often said that an infant's appointment of an agent is void, — that is, absolutely of no effect, — but this is so doubtful that the statement is not made in the text (see sec. 117 *post*).

his majority, subject to these exceptions: (*a*) contracts for necessaries are binding; (*b*) contracts made during infancy but ratified after attaining majority are binding. But an infant's contracts are binding upon the adult with whom they are made; the infant alone can repudiate them at his election.

(*a*) Necessaries include not merely the things necessary to sustain life but also such additional articles as are suitable to the infant's station in life and to his circumstances when purchased. In addition to food, lodging, clothing, medical attendance, and schooling, such articles as horses, watches, and jewelry have been held to be "necessaries" under particular circumstances; but the courts are not disposed to go beyond the normal list of necessaries. Even as to those the person who furnishes them cannot recover if the infant was already adequately supplied. If one can recover against an infant for necessaries, he can recover only the reasonable value, not what the infant may have agreed to pay.

(*b*) Ratification takes place when upon attaining his majority the infant promises to pay, or does an act which is a clear recognition of his liability. Some states require a ratification to be in writing, but this is not generally so.

Examples: 1. B, an infant, agrees to work for C for a year at $12 a month. He works a month and then quits. C has no action against B for breach of contract. B may recover against C for the labor performed.

2. Same contract. C discharges B at the end of a month without cause. B has an action against C for breach of contract. The adult is bound but the infant is not.

3. D, an infant, purchases jewelry of E and presents it to X. E cannot recover the price from D. It is immaterial that E thought D was an adult. It is immaterial that D represented that he was of age, although D might in such a case be liable in tort for deceit.

4. D purchases clothing for himself of E. D is liable, provided E can show that D was not adequately supplied according to his station in life. But although D promised to pay $50 for the clothing, E can recover only its actual value up to $50.

5. E purchases jewelry, not necessaries, of F. After attaining his majority E promises to pay for the jewelry. E is now liable upon the theory of ratification.

6. G, an infant, purchases a horse of H and pays for it. G may return the horse during infancy or within a reasonable time after attaining his majority and recover the money. This is disaffirmance, the opposite of ratification.

7. Same purchase. The horse dies. G may recover his money from H. When an infant disaffirms, the adult may recover what he parted with, if the infant still has it; but if it is lost or destroyed, the adult is nevertheless bound to return to the infant whatever he received from him.

16. Insane persons. If one contracts with an insane person, knowing him to be insane, the contract is voidable by the lunatic. If one contracts with a person who is insane and who has been judicially declared to be so by some competent judge or other officer,[1] the contract is probably voidable by the lunatic. If one contracts in good faith with a person not known to be insane but who is so in fact, the contract may be upheld if it is so far executed that to avoid it would damage the innocent party; if, however, it can be avoided and the innocent party be put *in statu quo*, the lunatic may avoid it even in this case.

An insane person is, like an infant, liable for necessaries. If he afterwards recovers his reason, he may ratify contracts made while insane.

Idiots' contracts stand substantially upon the same footing as the contracts of insane persons.

An intoxicated person, if so much intoxicated as to be unable to understand and appreciate the nature of his acts, may avoid a contract made while in such a condition.

17. Married women. At common law married women were incapable of making any binding contracts. Neither the married woman nor the other party to the contract was bound; the contract was absolutely void. She could bind her husband, not herself, upon a contract for necessaries.

This common law disability has been largely removed by statutes. These vary in the different states, but in general a married woman may now contract as fully as an unmarried woman, except that a married woman cannot, in some states, contract with her husband or as surety for her husband. These statutes are too numerous to be further considered.

[1] Statutes provide methods by which persons suspected of insanity may be brought before a court and the matter judicially determined. A judgment of insanity is constructive notice to all the world of the fact of insanity. The insane person's property is then under the control of a guardian or committee appointed by the court.

III. CONSIDERATION

18. Necessity of consideration. Save in the case of sealed contracts (and now in many states even as to these), every promise contained in a contract must rest upon a consideration in order to be enforceable. A contract not under seal is called a simple contract. A sealed contract is sometimes called a deed or a specialty; if for the payment of money, it is often called a bond.

Consideration consists in some legal detriment suffered by the promisee relying upon the promise, and there is usually some corresponding benefit to the promisor. Unless such consideration can be shown by the promisee he cannot enforce the promise against the promisor. Hence gratuitous promises are unenforceable. A mere moral obligation to do a thing is not a consideration for a promise to do it.

In negotiable instruments the law presumes consideration, but the promisor may show that none in fact exists.

At common law sealed instruments require no consideration. Many states by statute now provide that in sealed instruments there must be a consideration, but make the seal presumptive evidence that there is one, leaving the promisor to show, if he can, that there was none.

Examples: 1. A father makes and presents to his son a negotiable promissory note as a gift. The son cannot enforce it if the father sets up want of consideration as a defense.

2. The son negotiates the note before maturity to X, who pays the son for it in good faith. X may enforce it against the father because X has suffered a legal detriment in parting with his money, relying upon the father's promise (see sec. 104 *post*).

3. A father says to his son, "I will give you $500 if you refrain from smoking until you are twenty-one." The son refrains. He may enforce the promise. He has suffered a legal detriment in doing what he was not legally bound to do.

4. B promises C that he will repair C's watch free of charge. He afterwards refuses to do so. C has no remedy. There is no consideration for B's promise.

5. Same promise. B undertakes the repairs and does them so badly as to ruin the watch. B is liable to C for gross negligence. C suffers a legal detriment in parting with his watch.

19. The consideration need not equal the promise in value. The law allows persons to affix their own value to acts or forbearances. If the promisee does or forbears anything he is not bound to do or forbear, there is sufficient consideration. But if the promisee does or forbears something he is already bound to do or forbear, there is no consideration. The problem in many cases is whether the promisee has done or forborne what he was not under a legal obligation to do or forbear. Such cases will be considered in concrete examples.

Examples: 1. John Doe promises Richard Roe that if Roe will name his child after John Doe, the latter will pay Roe (or the child) $1000. Roe names the child after Doe. He may recover the $1000. He has done what he was not legally bound to do.

2. B agrees to pay C $200 for a buggy worth but $50. C agrees to deliver the buggy to B for $200. C may recover the $200. C makes a promise which he is not bound to make, and which B may enforce against him, and this is a consideration for B's promise.

3. F has a horse belonging to E which he wrongfully refuses to deliver up. E promises F $50 if he will deliver it and F does deliver it. F cannot recover the $50. He has merely done what he was legally bound to do.

4. (*Successive promises.*) G contracts to dig a well for H for $60. When down a few feet, G strikes rock and refuses to go on. H promises G an extra $25 if he will finish the well. (*a*) Some courts say G cannot recover the extra $25 because he merely did what he was already bound to do. (*b*) Some courts say G was not bound to go on because he had an option to stop and pay damages for the breach of contract, and that G therefore did what he could not be legally compelled to do. (*c*) Some courts say that the old contract was by agreement rescinded and a new one for $85 was made. This case illustrates how conflicts of judicial decisions grow up where, as in our country, we have so many courts independent of each other.

5. (*Payment of smaller sum.*) K owes L $100. L says, "If you will pay me $60, I will release the other $40." K pays the $60. L may also recover the other $40. The payment of a smaller sum in satisfaction of a larger is not a sufficient consideration to support a promise to release the balance, because K is already legally bound to pay the $60. But if, by agreement, K also gives L a jackknife, he has done what he was not legally bound to do, and the $40 claim is discharged.

6. (*Composition with creditors.*) M owes various creditors A, B, C, etc. M agrees to pay each 60 per cent of his claim, provided he and all others will release M from the balance; they all agree to do this. M pays each 60 per cent. A afterwards sues M for the remaining 40 per cent of his claim. A cannot recover. This is called a composition with creditors.

The reasons given for upholding it are not consistent, but it is often said to be an exception based upon the policy of encouraging such compositions and upon the policy of forbidding one creditor to recover more when by a kind of mutual arrangement all have consented to take the same percentage.

7. (*Mutual subscriptions.*) The X church is raising money for a new bell. A, B, C, etc., each subscribe the sum set opposite their names. May these promises be enforced? Is there any consideration for them? (*a*) Some courts say there is none unless the X church has acted upon the promises by purchasing a bell or contracting for one. (*b*) Other courts think the promises mutually support each other, and that B subscribes in consideration of A's subscription, etc. (*c*) Other courts think the X church by accepting the promises agrees to execute the plan, and that this promise is the consideration for the promises of the subscribers. Here, again, we have a conflict of authority upon a difficult question of law.

20. A past consideration will not support a promise. A past consideration is one performed or finished by B without request and before any promise is given by C. If C should afterwards promise something to B by way of compensation or reward for the benefit conferred by B's act, this promise would rest upon a past consideration and would be unenforceable.

Examples: 1. B without C's knowledge or request moves a stack of hay standing on C's farm in order to save it from a spreading fire. When C learns of this, he promises to pay B for his time and trouble. This promise is unenforceable because it rests upon a past consideration.

2. D finds a lost article and returns it to C, the owner. C promises to pay D a certain sum by way of reward. D cannot recover upon this promise; it rests upon a past consideration.

To this rule there are certain apparent exceptions.

(*a*) If there is a request by C that B move the stack or that D search for the lost article, the law implies a promise to pay for the service; and when C expressly promises to pay he is merely confirming the implied promise, and his expressed promise is substituted for the implied one and is enforceable.

(*b*) If there is some legal bar to enforcing a contract against C, which he may set up or not, he may under certain circumstances, by a subsequent promise, render himself liable on such a contract notwithstanding the bar. Such legal bars are infancy, or the Statute of Limitations, or discharge in bankruptcy, and the like.

Examples: 3. B, an infant, purchases jewels of C. When B arrives at his majority he promises to pay for them. B is liable to C. Some say B's promise rests upon the past consideration, that is, the delivery of the jewels, and that C suffers no detriment relying upon the new promise. Others treat B's promise merely as a waiver of his plea of infancy, and thus escape the difficulties of consideration.

4. D owes E a debt which is barred by the Statute of Limitations, that is, a statute providing that an action for debt or breach of contract must be begun within a certain time (usually six years). If E sues D, the latter may plead the statute and escape. But after the debt is barred D promises to pay it. D is now liable. The case is practically the same as that of the infant.

5. F owes G a sum of money. Without any new consideration, F gives G a chattel mortgage or other security. The chattel mortgage is enforceable. The antecedent debt, although a past consideration, is sufficient to support it.

21. The consideration must be legal. Illegal contracts will be dealt with later. It is enough to say here that if A's promise rests upon a counter promise or an act of B's which is illegal, then A's promise cannot be enforced. Thus, A promises to pay B a sum of money if B will purloin a document from C. B purloins the document. He cannot recover the sum promised because his act constituting the consideration is illegal. So, also, promises to pay money lost in gambling are unenforceable because all gambling or wagering contracts are illegal.

IV. Form: Writing; Seal

22. Statute of Frauds. The Statute of Frauds (so called because it was intended to prevent fraud and perjury in the proving of contracts before the courts) was enacted by the English Parliament in 1676 and has been substantially reënacted, in whole or in part, by most of the American states. Two sections of this statute, the fourth and the seventeenth, are those that deal particularly with contracts.

1. *Fourth section.* The fourth section provides in substance that in order to be enforceable the following contracts, or some note or memorandum of them, shall be in writing and signed

by the party to be charged (that is, the one against whom it is sought to enforce the contract) or by his authorized agent:

(*a*) the promise of an executor or administrator to pay out of his own estate that which is due from the estate he is administering;

(*b*) the promise to answer for the debt, default, or miscarriage of another, that is, to be surety that another will pay his debts or discharge any of his legal obligations (see chap. viii);

(*c*) the promise to do anything, as transfer property, in consideration of marriage, that is, where the marriage is the consideration for such promise;

(*d*) any contract or sale of lands, or any interest in or concerning lands (though in the United States generally leases for less than one year are excepted);

(*e*) any contract which by its terms is not to be performed within the space of one year from the time of the making thereof; but if it may be fully performed within one year it does not require a writing.

It must be observed that this requirement is in addition to all other requirements. All contracts require a true agreement, competent parties, and consideration. These contracts require all those things and also a writing duly signed. Most contracts may be proved by parol evidence; these contracts may be proved only by a writing. The writing may be a mere memorandum stating the chief points in the agreement, or it may even consist of a series of letters so connected as to make together a complete memorandum. Careful persons will make a full memorandum, being particular to name the parties, the subject-matter, the consideration, the terms and conditions, and to have this memorandum signed by both parties to the contract. If the writing fails to state any essential term, it is unenforceable, for that term would have to be proved by parol evidence, and the statute forbids this.

In many states additional contracts requiring a writing are enumerated, as, for example, a promise to pay a debt discharged in bankruptcy, a promise to pay a debt barred by the

Statute of Limitations, a promise after arriving at majority to pay a debt contracted during infancy, the acceptance of a bill of exchange, a fire insurance policy, a limited partnership, a common law marriage, and many others. Whether a particular contract must be in writing in a given state can be ascertained only after a careful examination of the statutes of that state.

2. *Seventeenth section.* The seventeenth section of the Statute of Frauds provides that a contract for the sale of goods, wares, and merchandise (that is, any personal property) of the value of ten pounds or upwards shall be unenforceable unless the buyer accepts part of the goods so sold and actually receives the same, or gives something in earnest to bind the bargain or in part payment, or there be a note or memorandum in writing signed by the party to be charged or by his authorized agent.

It will be observed that a contract to sell land can be evidenced in only one way, namely, by a writing, while a contract to sell goods of the value of $50 or more may be evidenced in any one of three ways, namely, by a receipt of the goods or a part of them, by a part payment of the price or payment of "earnest money," and by a writing. States differ as to the value below which no special form is required under the seventeenth section. Some fix it as low as $30, and some as high as $200. Several states do not have this portion of the statute at all.[1] In these states a contract to sell goods, no matter of what value, may be proved by parol although there has been

[1] It is not found in Alabama, Arizona, Delaware, Illinois, Kansas, Kentucky, Louisiana, New Mexico, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, West Virginia.

In the following states and territory the sum is fixed at $30: Arkansas, Indian Territory, Maine, Missouri, New Jersey.

In the following it is fixed at $33: New Hampshire.

In the following it is fixed at $40: Vermont.

In the following it is fixed at $50: Alaska, Colorado, Connecticut, District of Columbia, Georgia, Indiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New York, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Washington, Wisconsin, Wyoming.

In the following it is fixed at $200: California, Idaho, Montana, Utah.

In the following a contract for the sale of goods of any value, however small, must conform to the statute: Florida, Iowa.

neither delivery nor payment. It is generally thought that the statute as to the sale of goods has outlived its usefulness and should be everywhere repealed as an unnecessary restraint upon commerce.

It is difficult at times to say whether a sale is of real property or of personalty. The sale of standing trees to be cut by the buyer is generally held to be a sale of realty; but if the seller is to cut them, the contract contemplates that they shall be personal property when delivered to the buyer. Growing annual crops, known as emblements, are considered personalty, while fruits, grass, and other perennials are held to be in the same class as trees.

23. Contracts under seal. Any contract may be made in writing under seal. Conveyances of land must be by deed, that is, under seal. Statutes may require other contracts or conveyances to be sealed, but the modern tendency is to decrease rather than magnify the importance of the seal. An unsealed contract is called a simple contract.

A seal at common law was an impression on wax or other adhesive substance affixed to the document to be sealed. In the Middle Ages, when few persons could write, each important person had his own seal or signet which took the place of his signature. In modern times a mere scroll with the pen is declared by statute, in most states, to be a sufficient seal. The commonest form is to write the word "seal" after the name and make a rough circular scroll around it with the pen.

While very few contracts must bear a seal, any contract may bear one. If a contract is sealed, it has certain characteristics which it would not have if it were unsealed. Chief among these are the following.

1. At common law the contract under seal does not require any consideration. For example, a father promises under seal to pay his son one thousand dollars, this being merely a gift without consideration. Such an instrument is called a bond and is enforceable. Were such promise made in an unsealed instrument, the son could not enforce it for want of consideration. Were it made in a negotiable promissory note, the son

could not enforce it; but if he negotiated it to another person who paid value and had no notice of the absence of consideration, the transferee could enforce it.

By statute in many states the common law rule upon this point has been changed and the seal is made merely presumptive evidence of consideration; that is, it dispenses with the necessity of the proving of consideration by the one who seeks to recover upon the instrument, but it leaves the defendant free to prove that there was no consideration and thus to defeat the instrument. Even this statutory provision has not, however, succeeded everywhere in depriving the seal of its importance as a substitute for consideration. Some courts have held that if the seal is used expressly to give validity to a gratuitous promise, it will be effective for that purpose notwithstanding the statute; but if it is used in a contract where a consideration was intended but has failed, the defendant notwithstanding the seal may prove that there is no consideration and thus defeat the contract. Under this holding, a bond to give money without consideration would be good, while a bond to pay money for services to be rendered would not be enforceable in case the consideration failed, that is, the services were not rendered.

In a few states a sealed contract is by statute put upon precisely the same basis as an unsealed contract, that is, seals are practically abolished.

2. Only the parties to a sealed instrument may sue or be sued upon it. In an action upon an unsealed contract it may be shown that a party named is in fact an agent for a party unnamed, and the latter may sue or be sued upon such unsealed contract.

3. A right of action upon a sealed contract is not usually barred so soon by the Statute of Limitations as an action upon a simple contract. The period allowed upon a sealed contract varies in the different states from ten to twenty years, while the period allowed upon a simple contract is usually not more than six years.

Examples: 1. "I promise to pay John H. Blackheath one thousand dollars on February 10, 1906. WILLIAM BLACKHEATH." This is a simple contract to pay money; if made as a gift, no one can enforce it.

2. "I promise to pay to John H. Blackheath, or order, one thousand dollars on February 10, 1906. WILLIAM BLACKHEATH." This is a negotiable promissory note. If made as a gift, John cannot enforce it; but he could negotiate it to another person who might enforce it.

3. KNOW ALL MEN BY THESE PRESENTS: That I, William Blackheath, am held and firmly bound unto John H. Blackheath in the sum of one

thousand dollars to be paid to the said John H. Blackheath, his executors, administrators, or assigns, on February 10, 1906; to which payment I bind myself, my executors and administrators by these presents.

Witness my hand and seal this tenth day of February, one thousand nine hundred and five.

WILLIAM BLACKHEATH. [Seal]

This is a bond. Although made as a gift, John may enforce it at common law.

V. LEGALITY OF OBJECT

24. Contracts made illegal by statute. The statutes may declare a contract to be illegal, may prohibit it, or may simply penalize it. It is a question of construction whether prohibited and penalized contracts are illegal.

1. Certain contracts are declared by statute to be illegal. Such are contracts for gambling or wagering, contracts for usury, in some states contracts for work labor or any unnecessary act to be performed on Sunday, and in some states any contract made on Sunday even though performance is to be made on a secular day.

2. Certain acts are prohibited by statute. A contract to perform a prohibited act, or involving such an act, would be an illegal contract.

Example 1. The statute prohibits prize fighting. A contract to engage in a prize fight is illegal. Again, the statute prohibits any person from engaging in the practice of medicine without first obtaining a license. An unlicensed physician cannot recover compensation for professional services. A teacher cannot recover for his services in a public school unless he is duly licensed.

3. Certain acts are penalized by statute but are not in terms prohibited. In such cases it is a question of construction whether a contract to do the act is illegal.

Examples: 2. The statute provides that any one who sells a lot in a plat in any city without first recording the plat in the appropriate public office shall pay a penalty of $50 for each offense. A sells B a lot in an unrecorded plat. B afterwards refuses to take the lot and pay the purchase price. Is the contract of sale of this lot an illegal contract? It has been held not, because the court thought it was not the object of the statute to

prohibit such sales but merely to make it so expensive to deal in lots in unrecorded plats that landowners would be induced to record the plats.

3. The statute fixes a penalty for the sale of adulterated foods. B sells to C a quantity of adulterated foods. C is not bound. He may refuse to take the goods and pay the price on the ground that B's contract is illegal. The intent of the statute is to prevent the sale of adulterated goods.

25. Wagering contracts. A wagering contract is an agreement to give money or property upon the determination or ascertainment of an uncertain event. The consideration for such promise may be either a like promise or something given outright.

Examples: 1. A and B contract that if A's horse wins a race with B's horse, B shall pay A $100; but if B's horse wins, A shall pay B $100.

2. A promises to pay B $100 in case B's horse wins, provided B pay A in hand $20. If B's horse wins, A would pay B $100 and would be $80 out of pocket; if B's horse loses, A has his $20 and B is that much out of pocket.

3. A, B, C, etc., each pay an entrance fee as a condition of competing for a purse or prize at a horse-racing contest. This is not a wager unless the competitors are the sole contributors to the purse and thus practically bet each against the others, or unless this form is adopted as a subterfuge to conceal a wager.

It seems that by the common law of England wagering contracts were not illegal. Judges later regretted that the law was not otherwise, and became very astute in finding reasons for holding particular wagers illegal, as, for example, that a wager on the life of Napoleon was illegal because it gave one wagerer an interest in keeping the king's enemy alive and the other an interest in compassing his death by means other than lawful warfare. But even with such refinements as these the courts felt bound to enforce many wagers. In New York wagers were held to be legal. In Massachusetts, however, the courts refused to follow the English rule and held them to be illegal. Now, by statute, they are generally declared to be illegal in all jurisdictions.

Wagers on the rise and fall of prices. The form of this wager is that one party sells another grain or stock for future delivery at a specified price; but in fact neither party intends an actual delivery, and both intend to settle on the delivery day

the difference between the contract price and the market price in money. It is equivalent to betting that the market price on a certain day will be so much. Often these take the form of "options" as well as "futures," that is, A sells B the option to call for wheat on a certain day at a certain price, or A sells B the option to deliver wheat on that day at a certain price, or A may sell B the option to call at one price or deliver at another; the first is termed a "call," the second a "put," and the third a "spread" or a "straddle." Whenever the intent is merely to settle the gain or loss in money, and there is no intent to deliver or receive the article itself, the transaction is a gambling contract and illegal.

Examples: 4. "I have sold John Doe 100 shares of stock in the X.Y. Co. at 85 per cent, payable and deliverable at seller's option in 30 days. RICHARD ROE." This may be a valid contract giving the seller the right to deliver the stock at any time within 30 days at $85 a share (par value $100); or it may be intended that on any day when that stock is worth say $80 a share, the transaction shall be closed by the buyer paying the seller $500. The transaction must be closed at the end of 30 days, if not closed earlier.

5. "For value received the bearer may call on me for 10,000 bushels of wheat at 70 cents a bushel on Sept. 1, 1905. RICHARD ROE." This is a "call." The buyer on September 1 will "call" for the wheat if it is more than 70 cents a bushel, but not if it is less. If it is more, he makes the excess, less what he paid for the option; if it is less, he loses what he paid for the option. When the differences are intended to be settled in money this is a gambling contract, but is perfectly valid if actual delivery is intended.

6. "For value received the bearer may deliver to me 10,000 bushels of wheat at 70 cents a bushel on Sept. 1, 1905. RICHARD ROE." This is a "put." If wheat is 60 cents a bushel on September 1, the seller will "put" it on Roe, who must pay 10 cents a bushel to the seller. The latter thereby makes $1000, less what he paid for the option. If it is more than 70 cents a bushel, the seller will not "put" it, and he loses what he paid for the option. But this contract is valid if actual delivery is intended.

7. "For value received the bearer may call on me for 10,000 bushels of wheat at 80 cents a bushel any time in 60 days from date; or the bearer may, at his option, deliver the same to me at 75 cents a bushel. RICHARD ROE." This is a "spread." If the call and put prices were the same, it would be a "straddle." If actual delivery is intended (as it rarely is), this would be a valid contract. But if it is intended to settle gains or losses in money, it is a gambling contract.

Insurance. Insurance was at one time a favorite wagering contract. Thus persons not at all interested in a ship or its cargo would take out insurance upon it, in order that if it was lost they might recover the amount named in their policies. Very often insurance was taken upon lives in which the policy holder had no interest. This is in general made illegal by statute. In order that an insurance policy may be legal, the one insured must have some insurable interest in the property or the life covered by the policy. Even in such cases the insurance contract is a kind of wagering contract, but it is one permitted by the policy of the law.

26. Contracts illegal at common law. The common law has indicated a very considerable number of instances in which it will regard contracts as illegal because contrary to public policy. Only a few of them can be enumerated.

1. Contracts to commit crimes or civil wrongs (torts) are illegal. Thus, a contract to commit an assault would be illegal for both reasons, since an assault is both a crime and a tort.

2. Contracts to do acts which injure the public service or interfere with the administration of justice are illegal. A contract to obtain a public office or vote for another for office, to influence legislative action by "lobbying," to quiet competition for public contracts, to stifle the prosecution for a public offense, to carry on a suit as an attorney at the expense of the attorney and share the proceeds (champerty), to suborn witnesses, and the like, are all illegal.

3. Contracts which affect the freedom or security of marriage are illegal. Such is a contract to procure a collusive divorce; and such is a marriage brokerage contract, that is, a contract by A to procure or bring about a marriage between B and C for a consideration paid or to be paid by either B or C to A.

4. Contracts in restraint of trade may be legal or illegal according as the restraint is reasonable or unreasonable. Such a contract is reasonable when it is reasonably necessary to protect the promisee in a business not involving a public franchise or "impressed with a public trust." Beyond this point it is unreasonable and illegal.

Examples: 1. A buys B's retail shoe store in the city of Ithaca, and B agrees not to engage again in the shoe trade in Ithaca. This is reasonably necessary to protect A against B's competition, and is held to be not so injurious to the public as to render it against public policy. If B agrees not to engage in the retail shoe trade in the state of New York, this would be obviously a greater restraint than is reasonably necessary and would be illegal. If he agrees not to engage in the retail shoe trade in the county in which Ithaca is situated, this might be reasonable or unreasonable according to circumstances. Some states hold any restraint which includes the whole of the state to be unreasonable, but this is contrary to modern tendencies.

2. The maker of guns and heavy ordnance of which governments were the chief purchasers sold his business and agreed that for twenty-five years he would not engage in a like business anywhere in the world. It was held by the English court that this restraint was reasonably necessary to protect the purchaser, since a manufactory of such guns anywhere in the world would be a competitor.

3. If the business is one carried on under a public franchise (as a franchise to lay gas pipes in public streets), or if it is impressed with a public trust or interest (as the business of a common carrier who must serve all members of the public on equal terms), the courts may hold even a local restraint unreasonable, not as to the promisee but as to the public whom the parties are bound to serve.

4. Agreements to combine for the purpose of lessening competition, limiting the output, regulating prices, dividing the territory in which business shall be done, and the like, are illegal because detrimental to the public welfare.

27. Effect of illegality upon contracts in which it exists. In determining the effect of illegality upon a contract in which it exists, it is necessary to determine whether the contract is divisible or indivisible, and if divisible, whether the legal may be separated from the illegal portion.

1. If a contract is indivisible, that is, if it has one indivisible promise or act on one side and one on the other, the whole contract must fail if one of these be illegal.

Example 1. A agreed to work for B for a specified sum per month, and to take charge of B's barroom and bar. It was illegal to maintain a bar for the sale of intoxicating liquors. A performed various services including the sale of liquors at the bar. A cannot recover the agreed price for his services because A's promise to perform the services is an indivisible one and is tainted with illegality. He cannot recover for the legal services, that is, those not connected with the sale of liquors, because the promise of B is not apportioned but entire, and the promises and acts of A are also entire. The whole contract must therefore be regarded as illegal and unenforceable.

2. If the contract is divisible, that is, if there be two or more promises on one side and a separate consideration for each on the other side, and if the legal may be separated from the illegal, the legal portion may be enforced unless the illegal part is so immoral or criminal that the courts think it best to give the parties no relief.

Example 2. A sells his retail business to B for $10,000, and in consideration of $1000 more A agrees not to engage in a similar business again anywhere in the state. The second agreement is illegal as an unnecessary restraint of trade, but it rests upon a separate consideration and can therefore be separated from the legal part, and the latter may be enforced.

3. Ordinarily the law gives no relief to either party to an illegal contract either by enforcing the contract or by allowing a party to it to recover anything paid or advanced under it. But it may aid a party to get back what he has paid, provided he is, as compared with the other party, innocent of an illegal intent, or provided his recovery of the money would prevent the illegal transaction from being carried out. Statutes often provide that money paid on a gambling contract may be recovered.

Examples: 3. A marriage broker induces an ignorant immigrant to pay him money to secure her a husband. The court thinks the parties are not in equal guilt, since the woman is ignorant and is played upon by the superior ability of the broker, and permits her to recover the money.

4. A pays B a sum of money to commit an assault on C. To allow A to recover this before the assault is committed would remove the inducement for B to commit the assault. Such recovery is not out of consideration for A but out of consideration for C and the public peace.

VI. Reality of Consent

Agreement consists in the meeting of the minds of the parties. But if one mind or both give consent by mistake, or if one is misled by misrepresentation or fraud, or if one is compelled by duress or undue influence, there may be no true agreement. In such cases the contract may be avoided by the party misled. We have then to consider the effect of mistake, fraud, duress, and undue influence.

28. Mistake. Mistake about some material fact connected with the contract may be mutual, that is, common to both parties, or unilateral, that is, made by one party alone. (1) The fact about which a mutual mistake occurs may be as to the subject-matter of the contract, namely, (*a*) its existence, (*b*) its identity, or (*c*) its quality. (2) Unilateral mistake may be (*a*) unknown to the other party, (*b*) known to the other party, (*c*) as to the identity of a party, or (*d*) as to the nature of the transaction itself.

(1) (*a*) Mutual mistake as to the existence of the subject-matter of the contract really prevents a contract from being formed at all.

Examples: 1. A sells B a horse. Unknown to either party the horse died before the contract was made. There is no contract because there is no subject-matter upon which the minds of the parties could meet.

2. A cargo is at sea. The owner sells it subject to the risk of its being already lost. The buyer is bound although the cargo was lost when the contract was made, because the buyer assumes the risk. There is no mistake, because that risk is a part of the subject-matter of the contract. If the owner knew it was lost, the contract can be avoided for fraudulent concealment.

(*b*) Mutual mistake as to the identity of the subject-matter enables either party to avoid the contract.

Example 3. A says, "I have purchased X's horse Billy and will sell him to you for $250." B replies, "I will take him at that price." X had two horses named Billy. A knew only the one he bought and B knew only of the other. There is no binding contract. The minds have not met upon the same subject-matter.

(*c*) Mutual mistake as to the quality of an article will not ordinarily affect the validity of a contract.

Example 4. A finds a stone which appears to be a jewel of some kind and thinks it is a topaz. B, equally uncertain as to its quality or value, buys it for a small sum. It turns out to be an uncut diamond of great value. The contract is binding. Neither party knew the true nature of the stone and each had an equal opportunity to ascertain.

(2) (*a*) Unilateral mistake unknown to the other party is not ordinarily a ground for avoiding a contract.

Example 5. A sells the stone (as above) believing it to be a topaz. B knows it is a diamond but is ignorant of A's belief. The contract is binding. A alone is mistaken and B has neither induced A's mistake nor taken fraudulent advantage of it.

(*b*) Unilateral mistake known to the other party and taken advantage of by him may enable the mistaken party to avoid the contract. But this doctrine has rather narrow limits. If the opportunity of knowledge is equally open to both parties, one is not bound to reveal to the other what he has by superior diligence discovered.

Examples: 6. A buys of B the negotiable paper of X. A believes X to be solvent. B has just learned of X's insolvency and knows that A has not yet learned of it or had a reasonable opportunity to learn of it. A may avoid the contract. B's fraudulent concealment is fatal.

7. A sells his land to B. There is a valuable mine in it. A does not know this. B does know it and knows that A is ignorant of it. The contract is binding. B is not bound to disclose what A has had an equal opportunity to discover, but B must not by any word or artifice mislead A.

8. A sells cotton to B, the price being dependent upon whether the war between the United States and Great Britain is ended. A asks B whether there is any news of peace. B, knowing that peace has been declared, says there is no news. He thereby confirms A's mistake and A may avoid the contract.

(*c*) Unilateral mistake as to the identity of the other party will avoid a contract.

Example 9. A has been accustomed to deal with B. Unknown to A, B has sold his business to C. A sends an order for goods to B. C gets the order and ships the goods. A is not bound. He has a right to select whom he will deal with, and is not obliged to have another person than B introduced into the contract.

(*d*) Unilateral mistake as to the nature of the contract may avoid it.

Examples: 10. A is induced by a trick of B to sign a negotiable note thinking he is signing a contract to sell goods for B. A is not bound.

11. As above. B indorses the note to C, who pays value for it in ignorance of B's fraud. A is not liable to C unless C shows that A's negligence in signing the note is so great as to make it just that he should suffer rather than C. When the rights of an innocent third party are in question, A may be estopped to set up the mistake and the fraud. Whether A's negligence is so great as to work such an estoppel is a question of fact.

29. Fraud and misrepresentation. Fraud consists in a false representation of fact, made with knowledge of its falsity (or with reckless disregard of its truth or falsity), with the intention that it should be acted upon by another, and actually inducing that other to act upon it to his damage. Fraud by one party enables the other party to a contract to rescind it. Fraud is also a tort, and is called deceit in the law of torts.

Example 1. A seller of a horse represents him to be sound and healthy when, known to the seller and unknown to the buyer, he has the glanders. The buyer acts upon the representation, buys the horse, and afterwards discovers that it is diseased. The buyer may either (*a*) rescind the contract, that is, return the horse and recover the purchase money, or (*b*) keep the horse and recover damages in an action in tort for deceit.

If in the above case the seller actually believes the horse to be sound when he makes the statement, there is no fraud but merely innocent misrepresentation. In such case there can be no action for deceit, since in order to base an action for deceit it is necessary either to show that the seller knew that what he said was false, or to show that he knew that he did not know whether it was true or false, that is, made the statement without any belief and in reckless disregard of its truth or falsity. At common law a contract would not be set aside for innocent misrepresentation, and this is probably the generally accepted rule, although the equity courts often set contracts aside upon this ground.

Misrepresentations of fact may take the form of warranties, in which case they become collateral contract promises, and an action lies for the breach of them (see sec. 53 *post*). Representations may become a part of the main contract, and then if they are false the contract is broken, and an action lies for its breach. Whether a representation merely induces one to make a contract, or becomes a warranty, or becomes a term of the contract itself, is a matter of construction too difficult to be treated here.

Example 2. The seller of a horse says, "I warrant him to be sound and healthy." Unknown to either party, the horse has the glanders. The buyer has an action in contract against the seller for a breach of warranty.

If the seller knew the horse had the glanders, the buyer could, at his election, sue for breach of warranty, or sue in tort for deceit, or rescind the contract and recover the purchase money.

If the misrepresentation is as to a matter of opinion rather than of fact, there is no actionable fraud, because the injured party has no right to rely upon it.

Example 3. The seller of a horse says, "This horse is the fastest animal in the county." No sensible buyer would attach any importance to such a "puff" by a seller.

In some cases where the defect is not discoverable upon examination, and is a fatal one, the seller may be under a duty to disclose it to the buyer. The general rule, however, is *caveat emptor*, — let the buyer beware. But in no case must the seller resort to "artful concealment" to cover up a defect.

Example 4. B sells C a mahogany log too large to be easily rolled over, and conceals a defect by rolling the defective part next the ground. This is artful concealment for which the buyer may rescind.

30. Duress. Duress consists in actual or threatened violence or imprisonment whereby the will of a contracting party is coerced. Such threatened violence or imprisonment may be directed against one's self or against a member of one's family. Whatever threat overcomes the will of the contracting party and compels him to do what he otherwise would not do, may in general be regarded as duress.

Example. A's son has been in B's employment and is charged with embezzlement. B threatens to have the son arrested and prosecuted unless A pays or secures to B the sum alleged to have been taken. A gives B his note for the amount. This note may be avoided upon the ground that it was given under duress, that is, under the fear occasioned by B's threat to imprison A's son.

31. Undue influence. Undue influence consists in an unconscientious use of power over the will of another whereby that other is induced to make contracts or gifts which he otherwise would not make. It is a subtle form of duress whereby a person of superior intellect and will dominates one of inferior capacity or experience.

Example. A stepfather manages the property of his infant stepchildren. As each one arrives of age the stepfather buys the property or interest, takes a conveyance, and pays an inadequate consideration. The conveyances so obtained may be set aside, since the influence of the parent or guardian is presumed to continue for some time after the child or ward reaches his majority, and the contract is made under such undue influence as is unfair.

In some cases, as parent and child, or attorney and client, the law presumes that the parent or attorney exercised undue influence. In other cases the burden is upon one who seeks to set aside a transaction to show that undue influence was in fact exerted.

How to make a Contract

The object in drawing up a contract should be to embody the exact agreement of the parties in such a manner that no future misunderstandings as to its terms shall arise. There is a rule of law that when a contract is reduced to writing the terms of the written instrument cannot be contradicted or varied by parol evidence. While there are some exceptions to this rule, not necessary to be mentioned here, the rule is very general in its application and should be borne in mind when the contract is written and executed. A very good way is for each party to put in one-two-three order the promises he is ready to make, and for the other party to see whether these are the promises he is willing to accept. When these bilateral promises are embodied in the written instrument the whole should be carefully considered again in order to make sure that each party has given and exacted just what he intends. It is very unwise to leave anything to an outside parol agreement.

A general form of a contract is here given. The particulars may be varied according to the actual agreement.

"THIS AGREEMENT, made in duplicate this fifth day of April, one thousand nine hundred and five, by and between Alfred Black, of the city of Ithaca, in the state of New York, of the first part, and William Coles, of the same city and state, of the second part,

"WITNESSETH, that the said party of the first part, for and in consideration of the agreement hereinafter contained, to be performed by the party of the second part, agrees to and with said party to construct and finish in a good, substantial, and workmanlike manner on the lot belonging to the party of the second part, and known as No. 15 in Prospect Street in the city of Ithaca, N.Y., one frame building in accordance with the plan and specifications hereto annexed, of good, substantial materials, on or before

the fifteenth day of November next. And the party of the second part, in consideration thereof, agrees to pay to the said party of the first part for the same the sum of five thousand dollars, lawful money of the United States, as follows: the sum of one thousand dollars when the foundations are completed; the sum of one thousand dollars when the frame or superstructure is inclosed; the sum of one thousand dollars when the structure is plastered; and the balance of two thousand dollars when the building is fully completed according to the plans and specifications.

"And the party of the first part further agrees that in case of his failure to complete the work by the date fixed he will pay to the party of the second part as liquidated damages, and not as a penalty, ten dollars for each and every day the full completion of his contract is delayed beyond that date.

"In Witness Whereof, the parties to these presents have hereunto set their hands the day and year first above mentioned.

Alfred Black.
William Coles."

If the signatures are to be witnessed, add at the left, "Signed in the presence of," and have the witness write his name beneath this phrase. If there is a witness, he must be produced in court in order to prove the signatures, or his absence must be satisfactorily accounted for. If there be no witness, then other evidence, as the testimony of the other party, the proof of handwriting, etc., may be resorted to in order to prove the signature in question. Little will now be gained in most states by adding a seal. If a seal is used, the final clause should read, "In witness whereof, the parties to these presents have hereunto set their hands and seals the day and year first above written" (see sec. 23 *ante* as to the effect of a seal).

If the signature of a party is to be affixed by his agent, the form should be "John Doe, by Andrew Bright, his agent." The use of the word "by" is very important. The signature "John Doe, Andrew Bright, Agent," might make Bright a party (see sec. 131 *post*).

If some one (A. B.) is to guaranty the performance by the party of the first part above, and if the guaranty is given at the time the contract is made, there may be written below the signatures the following:

"In consideration of the agreement above made by the party of the second part, I do hereby guaranty to the said party that the above-named Alfred Black will well and faithfully perform everything by the foregoing agreement on his part to be performed, at the times and in the manner above provided.

A. B."

If the guaranty is made subsequent to the contract to be guarantied, it will require a new consideration, and this should be expressed in the written guaranty; for example, "In consideration of one dollar to me paid by William Coles, the receipt whereof is hereby acknowledged, I do hereby guaranty, etc." (see sec. 88 *post*).

A simpler form of contract would be as follows:

"A. B. and C. D. do hereby mutually agree as follows: A. B. to (*state what A. B. promises*); C. D. to (*state what C. D. promises*). A. B.
Ithaca, N.Y., Jan. 5, 1905. C. D."

But the more formal phraseology is safer to use in order to make clear that the promises are mutually dependent and indivisible (see sec. 39 *post*).

A contract may be assigned in the following form:

"For value received, I hereby assign to E. F. the within contract.
Ithaca, N.Y., June 7, 1905. A. B."

REVIEW QUESTIONS AND PROBLEMS

SECTION **10**. Define contract. Distinguish agreement from contract. Illustrate. Distinguish affirmative and negative contracts. How many parties to a contract? What is a novation? Illustrate.

Problem 1. B in a spirit of frolic and banter offers C $300 for a watch worth $15. C in the same spirit accepts, takes B's check for $300 on a bank in which he has no deposit, and delivers the watch to B. C presents the check, and when it is dishonored, brings an action against B for the $300. B sets up the above facts and offers to return the watch. Should C recover the $300 against B?

11. Name the essentials of an enforceable contract.

12. What is the meaning of agreement. How is it determined when an agreement has been reached? Why must its terms be definite?

Problem 2. B offers to sell his horse to C for $165. C understands B to say $65, and replies, "I'll give fifty-five." B understands that C means "one fifty-five," having dropped the "one," as is not unusual among traders. B replies, "Sixty-five is the price." C then says, "I'll take him." Is there a contract?

Problem 3. B agrees to give his niece C 100 acres of land if she will live with him until her marriage and act as his housekeeper. C accepts and performs her part of the agreement. B refuses to convey to her any land. C sues for breach of the contract. Is there an enforceable contract? Has C any remedy?

Problem 4. B hires C and agrees to pay him "good wages," but afterwards refuses to give him any work. C sues for damages for breach of contract. Result?

13. Name three classes of agreements. Illustrate. Point out the different classes in Example 6, sec. 10.

14. How do agreements originate? Define offer. Define acceptance. What forms do offer and acceptance take? Explain bilateral executory contract; unilateral executory contract; executed contract. Define express promise; implied promise.

1. Must the offer be communicated? To whom? When is the offer of a reward published in a newspaper communicated? When one purchases a railway ticket who makes the offer?

Problem 5. C is on a train and B's agent comes through to take orders for the delivery of baggage. C gives the agent a check for his trunk and receives a receipt containing a notice that B will not be liable in case of loss to an amount exceeding $100. C does not read the receipt or know of its contents. The baggage is lost. Is C limited to a recovery of $100?

2. How may the acceptance be communicated? Are words necessary? Must it actually reach the offeror? Is mental acceptance sufficient? When an offer is made by mail when is the acceptance complete?

Problem 6. B asked C for an estimate of the cost of fitting up an office. C made the estimate (not an offer). B then wrote C saying that if C would do the work within two weeks he might begin at once. No answer was received. The next day B countermanded the order. Meanwhile C purchased material and began to work upon it at his shop. C now sues B for breach of contract. Was there a completed contract?

Problem 7. C has supplied B with eel skins used in his business. He has sent them without a specific order and B has kept them and paid for them. C sends B a quantity on April 2. B keeps them for some months unpacked. They are then destroyed by fire. Is B liable to C for the price? Yes –

3. What is the effect of a qualified acceptance? Illustrate.

Problem 8. B offers C 2000 tons of iron rails at so much per ton. C telegraphs, "Send me 1200 tons iron rails as per offer." B telegraphs a refusal to fill the order. C then telegraphs, "Send me 2000 tons iron rails as per offer." B again refuses to fill the order. C then sues B for breach of contract. Result? – Cannot recover

4. What control has the offeror over the offer before acceptance? Same question, when offer is made under seal and when offeree pays to have time to accept?

Problem 9. C is offering goods at auction. B bids $100 for the lot, but retracts the bid before the hammer falls. C refuses to accept the recall of the bid and knocks down the goods to B, who refuses to take them. C sues B. Was there a contract?

Problem 10. B sent a letter to C saying: "We are able to offer salt at 85 cents a barrel. Shall be pleased to receive orders." C at once ordered 2000 barrels at that price. B refused to fill the order, as salt had gone up in price. C sues B for breach of contract. Result?

5. Suppose the offeree accepts after the offeror has revoked but before the offeree knows of the revocation?

6. How does an offer lapse? What is the effect upon an unaccepted offer of the death of the offeror or of the offeree?

15. Who is an infant? When is he of age? Which of his contracts are binding during infancy? Which are binding after he is of age? What are necessaries? What is ratification?

Problem 11. B bought of C a bicycle for $50 on August 10 at 8 A.M. B's twenty-first birthday was on August 11, and it was proved that he was born at 10 P.M. of that day. C sues B for the agreed price. B seeks to disaffirm the contract and pleads that it was made during infancy. Result?

Problem 12. B, a student of eighteen years, engaged a room of C for forty weeks, at $2 a week, payable weekly. At the end of ten weeks he left the room and C was unable to secure another lodger. C sues B for $80. B pleads infancy. How much may C recover?

Problem 13. B while an infant bought jewelry (not necessary) of C. After B became of age he acknowledged the debt and said he would pay it as soon as he had the means. Is B liable to C?

Problem 14. B, an infant, buys a horse of C. After B is twenty-one he sells the horse to X. C sues B for the price of the horse. Can B succeed?

Problem 15. C, an infant, sells B a horse. Before C is twenty-one he brings an action to recover the horse from B. Will such an action lie during C's minority?

16. What contracts of an insane person are voidable? What are binding? Same questions as to idiots? Intoxicated persons?

17. What was the common law rule as to married women's contracts? What is a *void* contract? (Are an infant's contracts void?) How do statutes change the common law as to married women's contracts?

18. What contracts require a consideration? What instruments have presumptive consideration? What is the effect of a seal at common law?

Problem 16. C voluntarily supplied necessary articles to B's father, who was old and poor. B afterwards promised C to pay for them. C now sues B on that promise. Is B liable?

19. Must the consideration equal the promise in value? What is a valuable consideration? What is not?

Problem 17. B says to C, "If you will take a trip abroad, I will pay your expenses." C takes the trip, and now sues B for the expense incurred. Is B liable?

Problem 18. B writes to C, "If you will extend the time which A has to pay you his debt, I will become surety for A's payment." C extends the time and takes from A a new note on three months' time. A does not pay. C sues B. Should C succeed?

Problem 19. B and C were in dispute about a claim made by C upon B for an injury to goods which B was carrying for C. B finally agreed to give and C to take one half the amount C first claimed. C sues on B's promise. B answers that there was no consideration for his promise because he (B) was not liable at all to C for the injury to the goods.

Problem 20. C was a constable in A. B offered a reward of $100 for the arrest of X for a specified crime. C, knowing of the reward, arrested X in A, and now brings an action for the reward. What objection?

20. What is meant by a past consideration? Distinguish from an executed consideration. Illustrate. Effect of previous request? What is meant by waiving a legal bar to an action on a contract?

Problem 21. B says to C, "If you will look up certain of my debtors, I will pay you what is right." C does so. B then promises to pay C $100. How much may C recover?

21. What is meant by an illegal consideration? Illustrate.

22. What is the Statute of Frauds? Object? When first enacted? What sections deal with contracts? State the provisions of the fourth section. Of what may the memorandum consist? What must it contain? State the provisions of the seventeenth section. In what three ways may this section be satisfied? Is the seventeenth section in force in your state? If so, what contracts for personalty are within the statute?

Problem 22. A memorandum of sale made by an auctioneer read as follows:

> Oct. 9, 1866. This day sold B's house and land on Bartlett Street in Lewiston; was struck down to C for $1200, one third down.
>
> D. E., Auctioneer.

C sues B, alleging he (C) was to pay one third down, one third in one year, and one third in two years, and that B refused to carry out the contract. B pleads the Statute of Frauds. Is this a good defense?

Problem 23. B sells C by parol two standing trees for $10. Afterwards B refuses to allow C to cut the trees. C sues B for breach of contract. B pleads the Statute of Frauds. Result?

Problem 24. B. Ry. and C agree orally that if C will grade and lay a side track or switch, the Ry. will maintain the switch for C's benefit for shipping purposes as long as C may need it. C does his part. The B. Ry. refuses to perform its part. C brings an action for damages. The Ry. pleads the Statute of Frauds. Which provision? Result?

23. What is a seal? What is a sealed contract? What is the effect of a seal? What statutory changes in the effect of a seal?

24. What contracts are usually declared by statute to be illegal? What is the effect of prohibiting an act? What is the effect of affixing a penalty to the doing of an act?

Problem 25. A statute prohibits any work, labor, or business on Sunday. C agrees with B to procure advertisements to be published in B's Sunday newspaper. Is this contract illegal?

Problem 26. Under a similar statute B makes and delivers a promissory note to C on Sunday. May C enforce the note?

25. Define wagering contracts. Were they illegal at common law? Explain wagers on the rise and fall of the market. In what sense are insurance contracts wagering contracts?

Problem 27. C, a broker, sues B, a customer, for moneys paid and expended by C in certain stock transactions. It was understood between C and B that the purchases and sales made by C for B should not result in an actual transfer of stocks, but that in each case the contract should be adjusted by the payment of money by B in case the transaction proved to be a losing one, or to B in case it was a winning one. C paid out for B more than he took in for him. Can C recover this amount?

26. Enumerate and illustrate contracts illegal at common law. What is a contract in restraint of trade? Are all such contracts illegal? What is the test?

Problem 28. B had a claim against the United States. C agreed with B to secure an act of Congress appropriating money for the payment of the claim, and B agreed to pay C 25% of whatever sum Congress might appropriate. C secured an appropriation in favor of B for $12,000. B refuses to pay C, who then brings an action against him for $3000. Result?

Problem 29. C charges B with embezzlement. Upon C's agreeing not to prosecute B criminally, the latter gives C a promissory note for the amount. Is B liable upon the note?

27. What is an indivisible contract? What is the effect if any portion of it is illegal? What is a divisible contract? What is the effect if one part is illegal? If a party pays money upon an illegal contract, can he recover it?

Problem 30. C deposited $500 with B as a wager on a foot race, knowing it was to be a "bogus race," and intending to overreach some one. Before the race was run C became suspicious that he would be overreached, and demanded back his money. B refused to give it back, and finally paid it to A, the pretended winner of the race. C sues B for the amount. Result?

28. What is meant by reality of consent? What will prevent reality of consent? Distinguish between mutual and unilateral mistake. Name the classes of mutual mistake. Explain and illustrate each. Which will avoid a contract? When will unilateral mistakes avoid a contract?

Problem 31. Contract of sale of a lot of land on Prospect Street in Waltham. In an action against the buyer for the price he sets up that the land now tendered him is on another Prospect Street than the one he had in mind, and understood that the seller had in mind, when the contract was made. Is this a good defense?

Problem 32. C. Ry. prepares a rate sheet and by mistake prints the fare from A to D as $21.25 when it should be $36.70. B discovers the mistake and takes advantage of it by at once purchasing of a local agent a large number of tickets at the printed price. C. Ry. seeks to enjoin B from disposing of these tickets and to compel him to return them and receive back his money. Result?

29. Define fraud and its effect upon the contract. Distinguish innocent misrepresentation. Is this a tort? Will it avoid a contract? When does a representation become a warranty? What is the effect of a representation of opinion? What is fraudulent concealment?

Problem 33. B had engaged S to teach school in District A in case she secured a certificate by a certain time. C applied for the same school, and on being informed of the contract with S, stated to B that there would be no examination for teachers in time for the opening of school. B then engaged C. Later S appeared with the necessary certificate and B refused to allow C to teach. C sues B for breach of contract. *(a)* In case C knew there would be an examination can he recover? *(b)* In case C believed there would not be an examination can he recover?

Problem 34. C sold B cattle knowing they had Texas fever, a disease not discoverable by examination, and concealing the fact. The cattle died, and C sues for the price. Should he win the suit?

30. Define duress. Need it be against the contracting party?

31. What is undue influence? Distinguish from duress. When is it presumed?

Draw a contract by which you agree to work for John Doe as clerk in his store for one year with a vacation of two weeks, for $10 a week payable weekly, and are to have at cost price such goods, not exceeding $100 in the aggregate, as you may choose to select from his stock.

Draw a contract by which Richard Roe guaranties the faithful performance of your part of the above contract.

Draw an assignment of your right to the goods.

CHAPTER III

OPERATION AND DISCHARGE OF CONTRACTS

I. Liabilities and Rights of Third Parties

32. Liability of third parties. The problem here is twofold: first, whether any one can be made liable upon a contract who is not a party to it; and second, whether one may be liable for interfering with the formation or performance of contracts.

(*a*) Contracts bind only the parties to them. A person cannot be made liable upon a contract to which he was not a party, for agreement lies at the basis of all true contracts. But an undisclosed principal may be liable on a contract made by his agent, although by its terms it is a contract between the agent and the other party; this is an exception to the general rule, and is treated later (see sec. 129).

Examples: 1. A contracts with B. In fact A is acting for an undisclosed principal P. When B learns this he may hold P liable on the contract.

2. But if A, as above, exceeds the authority P gave him, B cannot hold P. It is really P's consent that A may make the contract that renders P liable.

(*b*) Third persons may render themselves liable in tort by interfering with contracts, by inducing one party to a contract to commit a breach of it, or by using unlawful means to prevent a person from making a contract. A boycott is brought about by inducing persons not to deal with the one boycotted. If force or fraud is used, the boycott becomes unlawful.

Examples: 3. A engages B to sing at his theater for the season. X induces B to break this contract and sing at X's theater. X is liable to A for the damages caused by B's breach of contract.

4. A is negotiating with B to sing at his theater. X falsely tells B that A is insolvent and cannot pay the salary. B refuses to contract. X is liable in tort to A for inducing B, by false representations, not to enter into a contract with A.

5. Strikers threaten to assault workmen who are seeking their places, and thus prevent the employer from getting new workmen. The strikers are liable to the employer for preventing him by unlawful means (threats of violence) from making contracts with those who otherwise would apply. The strikers may also be enjoined from using unlawful means for this purpose. If the strikers also keep customers away by such means, there is an unlawful boycott of the employer's business.

33. Rights of third parties. In most of the United States, but not in England or Massachusetts, if a contract is made by A with B for the direct benefit of C, the latter may recover upon it, although A furnished the consideration and the promise of B was made to A. This is especially so whenever A owes C some duty which he is seeking to discharge by giving C the benefit of B's promise. So also an undisclosed principal may sue upon a contract made by his agent in his behalf.

Examples: 1. A lends B money and B promises A to repay it to C to whom A owes money. C may maintain an action against B upon the promise made for his benefit.

2. An incoming partner promises an outgoing partner to assume and pay the latter's obligations to the partnership creditors. The creditors may sue the incoming partner upon the promise made for their benefit.

3. A father agrees to name his child after B, in consideration of B's promise to pay the child $1000 when he is twenty-one. The father names the child after B. When the child is twenty-one he may compel B to pay him the money so promised.

4. A contracts with B, but is secretly acting for P, an undisclosed principal. P may hold B upon the contract.

II. Assignment of Contracts

34. Assignment by act of the parties. A bilateral contract creates both liabilities and rights. The problem is whether either the liabilities or the rights may be assigned by a party to the contract to some other person.

1. *Assignment of liabilities.* A party to a contract cannot assign or transfer his liabilities under it. The other party has a right to look to the person with whom he has contracted. One could assign his rights and delegate the performance of his duties, but would remain liable if they were not properly performed.

Example 1. A let a carriage to B at a yearly rental for five years, and agreed to keep it in repair and to paint it every year. A sold his business to C and notified B that C would be answerable for future repairs. B refused to accept C and returned the carriage. B is right. He is not bound to look to anybody except A for the repairs. But nevertheless A could delegate to C the doing of the necessary work, remaining himself personally liable for any negligence or nonperformance. If the work is artistic work, the performance of it cannot be delegated; the other party has a right to the artistic skill of the person with whom he contracted.

2. *Assignment of rights.* The rights one acquires under a contract may be assigned if they relate to money or property, but one cannot assign a right to some personal service. At common law the assignee must sue in the name of the assignor, but statutes now generally give the assignee the right to sue in his own name. The assignee is subject to whatever defenses might have been set up against his assignor; he gets the assignor's rights, and no more.

Examples: 2. A contracts to give B $100 for B's horse. A assigns the contract to C. Upon tender of the $100 C is entitled to the horse. So also B could assign the right to receive the money.

3. A contracts to give B his note for $100 for B's horse. A assigns the contract to C. B is not bound to take C's note, nor is he bound to deliver the horse to C unless the latter tenders A's note.

4. C agrees to work for D in D's store for $30 a month. D sells the store to E and assigns to him the contract with C for services. C is not obliged to work for E under the contract.

5. F assigns to H a contract with G by which G agreed to deliver 100 bushels of oats in exchange for F's horse. H sues G for breach in refusing to deliver the oats after receiving the horse. G sets up that F fraudulently represented the horse to be sound and claims an offset in damages. H is subject to this defense precisely as F would have been.

35. Negotiability of certain contracts. Contracts contained in written instruments that are negotiable, such as bills of exchange, promissory notes, and checks, may be transferred by negotiation from hand to hand so that each new holder may recover upon them. Moreover, the transferee, if a holder for value and without notice, is not subject to the personal defenses which might have been set up against the transferror. This incident of negotiability is a peculiar attribute of these

instruments and will be more fully discussed under the head of Negotiable Paper.

The distinction between assignability and negotiability may be thus illustrated.

1. "On demand I promise to deliver to John Doe 100 bushels of wheat at eighty cents a bushel. RICHARD ROE."

Indorsed: "For value received, I hereby assign this contract to J. S. Dale. JOHN DOE."

2. "On demand I promise to pay to the order of John Doe one hundred dollars, value received. RICHARD ROE."

Indorsed: "Pay to J. S. Dale. JOHN DOE."

The first instrument is a common law contract. It is assigned by the promisee, John Doe, to J. S. Dale. The assignee, Dale, may maintain an action against the promisor, Richard Roe, in case the latter refuses to deliver the wheat upon tender of the price. At common law Dale would have to sue in the name of the assignor, Doe, and he would be subject to whatever defenses might have been set up had Doe brought the action himself, as, for example, that there was mistake or fraud in the contract. He may now generally, under statutory provisions, sue in his own name, but he is still subject to the same defenses.

The second instrument is a negotiable promissory note. It is indorsed by the promisee, John Doe, to J. S. Dale. The indorsee, Dale, may maintain an action in his own name against the maker, Richard Roe, in case the latter fails to pay at maturity; and if he gave value and had no notice of any defense, like mistake or fraud, he will not be subject to such defense even though Doe would have been subject to it if he had retained the note and brought the action.

The rules of negotiability came into the law from the custom of merchants, and are peculiar to a class of instruments known as negotiable paper.

36. Assignment by operation of law. Where a contracting party dies, most contracts which he might have assigned during his life pass to his executor or administrator, who may sue or be sued upon them. Contracts for personal services do not survive the death of either party, and contracts requiring

long-continued operations or conduct of business by an administrator will not be deemed to survive.

So where a person becomes a bankrupt his right to enforce contract obligations passes to his trustee in bankruptcy; but the trustee would not be bound to enter upon performance inconsistent with the purpose of winding up the bankrupt's affairs.

At common law a husband upon marrying became entitled to all his wife's personal property and could enforce her claims growing out of contract. Conversely he became liable for her antenuptial debts. But these common law rules have been almost everywhere swept away by statutes giving married women the control of their own property and making them liable for their own contracts.

III. Discharge of Contracts

37. Discharge by agreement including performance. An agreement to discharge a contract may be made by the parties to it after it is created, or the agreement as to a method of discharge may be contained in the contract itself.

1. *Waiver or rescission.* When a bilateral contract has been concluded and is a binding agreement, the parties to it, by a new agreement, may contract to discharge it. The consideration is the mutual release of A by B and of B by A from any further liability under it. If the contract has been performed by A but not by B, A may release B, but there must be some consideration for the release or it must be under seal.

Examples: 1. A agrees to sell and B to buy A's book for $1. A and B then mutually agree to release each other. A's promise to release B is the consideration for B's promise to release A, and *vice versa.*

2. A has delivered the book to B, and B now owes A $1. A promises B not to claim the dollar, that is, releases B from liability. The promise is not enforceable; there is no consideration for it. B gives A fifty cents and A releases B from the balance. Still there is no consideration; a smaller sum is not consideration for a larger. B gives A a ten-cent pencil in consideration of A's promise to release him; the promise is enforceable and B is no longer liable to A. A gives B a release under seal; it is

enforceable and B is released. A release under seal might be as follows: "For value received, I hereby release and discharge B.B. from all claims for the unpaid portion of the purchase price of X book. Witness my hand and seal this seventh day of February, 1905. A.A. [Seal]."

2. *Substituted contract.* The parties may by agreement substitute a new contract for an existing one.

Example 3. A agrees to dig a well for B for $50. A complains that he will lose money owing to the presence of rock which had not been contemplated. It is agreed that A shall dig the well and that B shall pay him $75. This may be treated as a substituted contract and thus escape the difficulties mentioned in sec. 19, Ex. 4, *ante*.

3. *Provisions for discharge.* The contract itself may contain certain provisions looking to a discharge under specified contingencies, as, for example, an agreement that either party may terminate it upon thirty days' notice. Insurance contracts or policies provide for a discharge in case of increase of risk, as in case the property remains vacant and unoccupied for more than ten days, and the like.

4. *Discharge by performance.* If in accordance with the terms of the contract either party performs what he has promised to perform, he is discharged. If both perform, the contract is discharged or executed. Tender is an attempted performance; if it is accepted, it discharges the one making it; if it is refused, it discharges him unless his contract is for the payment of money, in which case he is still liable on his debt but may plead the tender against a claim for interest or the costs of an action. A tender of money to be technically good must be of the exact amount due and in legal-tender money.

Legal-tender money in payment of private debts consists of any gold coin, silver dollars, United States notes ("greenbacks"), and United States Treasury notes, to any amount; fractional silver coins to the amount of ten dollars; nickel and copper coins to the amount of twenty-five cents. Gold and silver certificates and national bank notes are not legal-tender money, but are ordinarily received in payment of debts without objection.

A tender of a check or note of a debtor need not be accepted in place of money. If it is accepted, it is (in most states) regarded as merely a conditional payment unless otherwise expressly stipulated. If the check or note is not paid, the creditor can either sue upon it or, by returning it, sue upon the original claim for which it was given. But if the creditor takes

the note of some third person, which is the property of the debtor, it is regarded presumptively as payment, just as if he had taken a horse or other corporeal chattel owned by the debtor.

Before a party to a contract can be said to have performed he must have fully and exactly done what he promised. But in contracts for building or executing work with many specifications and details a deviation that is slight and not willful may be overlooked on the doctrine of substantial performance. The contractor, while he may recover upon such substantial performance, must deduct from his recovery the amount the other party is damaged by the deviation. A deviation which is more than slight or trivial, or which is willful, will defeat a recovery because it is not regarded as performance, and the contractor is not therefore discharged from his obligation.

Example 4. A agrees to build a house for B for $11,700. He has fully completed it according to specifications, except that there are some slight defects in the plastering. This is substantial performance and A may recover the contract price less an offset for the defect, which was in this case held to be $200. But if the deviation was willful or excessive, A could not recover. One court says: "It may be harsh doctrine to hold that a man who has built a house shall have no pay for it, but the fault is with the one who voluntarily violates his contract."

If one agrees to perform to the satisfaction of another, and the matter is one of personal taste, he cannot recover until the other is satisfied. But if it is a matter which is not one of mere personal taste, and the work would be lost if it were not accepted, the other must be satisfied when he ought reasonably to be satisfied.

Examples: 5. A agrees to paint the picture of B's wife to B's satisfaction. B is not pleased with it. He is not obliged to take it. A has not performed his contract.

6. A agrees to put in boilers in B's factory to B's satisfaction. A puts in the boilers. B is not satisfied. But if a reasonable man would say B should be satisfied, A has fulfilled his contract and B is liable.

38. Discharge by impossibility of performance. A contract may be discharged by an impossibility existing at the time it is made. In only the excepted cases will subsequent impossibility discharge a contract.

1. *Prior impossibility.* If impossibility exists and is known when the contract is made, there is no contract, because the promise to do an impossible act is not a real consideration for the counter promise or act. If the impossibility is not known, as if the subject-matter does not exist when the contract is made, the contract is ineffective, because there is no subject-matter upon which it can operate.

2. *Subsequent impossibility.* If an unforeseen difficulty arises subsequent to the formation of the contract, it will not, save in the cases enumerated, discharge the contract.

Example 1. A agrees to sell and deliver to B a quantity of beans to be raised by A. A's crop is destroyed by frost. A is liable for a breach of contract, since although he cannot deliver beans from his own land he can procure them elsewhere, and there is not, therefore, a real impossibility. If, however, it had been specified that A was to deliver the beans grown in a particular field, and the crop in that field had been destroyed, there would have been an impossibility due to the destruction of the subject-matter.

The following cases of impossibility arising subsequent to the formation of the contract will discharge the contract.

(*a*) *Legal impossibility.* If the impossibility is created by a change in the laws, or by an act of law, the promisor is discharged.

Examples: 2. A leases a wooden building to B and agrees in case it burns to rebuild it. It burns and B demands that it be rebuilt. A defends upon the ground that since the contract was made the city by ordinance has forbidden the erection of wooden buildings. The defense is good. A is not obliged to build except in wood, and the law prevents him from building in that material.

3. A agrees to work for B for three months. At the end of a month A is arrested and imprisoned. His contract is discharged since the law by constraining him has made it impossible for him to perform.

(*b*) *Destruction of the subject-matter of the contract.* Where the existence of a specific thing is essential to performance, the contract is discharged if the thing is destroyed through no fault of the parties.

Examples: 4. A agrees to let B occupy a hall for public entertainments. Before the time for occupation arrives the hall is destroyed by fire. The contract is discharged.

5. A sells B a buggy and agrees to repaint it and deliver it in thirty days. Before the work is finished the buggy is destroyed by fire. The contract is discharged. Neither party has any action against the other. (If the buggy had been in a deliverable condition, the title would have passed to B at once, and he would have been obliged to pay the agreed price although he had left the buggy in A's hands. This is more fully explained under the head of Sales.)

6. When work is to be done by A upon an article belonging to B, the destruction of the article discharges the contract, but A may recover for the work performed upon it before its destruction.

7. One may contract against loss or destruction. For example, A hires a boat and contracts that in case of loss he shall pay a specified sum. The boat is lost in a storm without A's fault. A is bound to pay as agreed.

(*c*) *Death or disability in the case of contract for personal services.* If the contract is for personal services, the death or incapacity of the one who is to perform such services will discharge the contract.

Examples: 8. A musician contracts to play at a theater. Owing to illness he is unable to do so. The theater manager sues for damages for breach. He cannot recover. The illness and consequent incapacity of the musician discharges the contract.

9. An unforeseen peril, as the prevalence of a dangerous contagious disease, may operate to discharge a contract for personal services within the infected district.

10. The death of a master or of a servant discharges the contract as between the survivor and the executor or administrator of the deceased person.

39. Discharge by breach. A contract may be indivisible or divisible and the promises may be mutually dependent or may be independent.

1. Where the promises on each side are mutually dependent and the contract is an indivisible one, a breach of performance by one party will discharge the other from performance and will give that other an action for damages against the one in default. A positive assertion by one party, prior to the time fixed for performance, that he will not perform, is an anticipatory breach and gives the other party an immediate right of action. If one party tells the other to stop performance, the latter cannot by going on add to the damages for the breach.

Example 1. A agrees to sell a horse to B for $100. A refuses to deliver the horse and receive the purchase price. B is discharged from any further obligation; he is not bound to receive the horse in case A should afterwards tender it, or to pay anything to A; and he may maintain an action for damages against A for the refusal to deliver when performance was due.

2. If, however, the contract is a divisible one, that is, made up really of a series of contracts, then the breach of one part will not discharge the other parts. The difficulty in these cases is in determining whether a contract is divisible or indivisible.

Example 2. A contracts to sell B 1200 tons of coal in twelve monthly installments of 100 tons. The English court held this to be a divisible contract, and that a breach in performance as to one installment would not discharge the contract as to the remaining installments. The Supreme Court of the United States held such a contract to be an indivisible one for the full amount specified, that the provision as to installments was subsidiary, and that a breach as to any installment would discharge the entire contract. Generally in the United States such contracts are regarded as indivisible.

3. Sometimes promises are not mutually dependent, and in such a case a failure of performance on one side may not discharge a promise on the other.

Example 3. A agrees to pay a certain rent for B's house and B agrees to allow A to occupy the house for one year and to give A the option to renew the lease for a second year. A falls in arrears upon his rent and B refuses to renew the lease. It is held that the covenant to renew is independent of the promise to pay the rent, and therefore B is not discharged from the promise to renew because of A's breach of the promise to pay. These cases are not very common, and the construction is so technical as to be chiefly the business of lawyers.

4. A warranty is a subsidiary promise attached commonly to a contract of sale. The breach of the warranty gives rise to an action for damages but does not generally discharge the main contract.

Example 4. A sells B a horse and innocently warrants it to be sound. After B has taken the horse he discovers that it is unsound and attempts to compel A to take it back and repay the purchase money. Many courts hold that this cannot be done and that B's only remedy is an action for damages for the breach of the warranty; but in Massachusetts and some other states B is allowed to rescind (see sec. 57 *post*).

40. Remedies for breach of contract. In case a contract is broken by one party to it these results follow:

(1) the other party is exonerated from further performance on his part;

(2) he has an action for breach of the contract in which he may recover as damages the contract price of whatever he has delivered or done, and also for any loss sustained by being prevented from completing the contract; *or*

(3) by treating the contract as entirely abandoned, he may, if he chooses, recover the value of whatever he may have himself already performed, that is, he may proceed upon an implied promise to pay a reasonable price or compensation.

Examples: 1. A sells 10,000 feet of lumber to B at $20 a thousand feet. A delivers 4000 feet, when B refuses to receive the remainder. A is not bound to deliver or tender any more. A may sue for breach of contract and recover $80 (the contract price of that delivered) *plus* the profit he would have made upon the remaining 6000 feet, which, assuming the lumber cost A $15 a thousand and is now worth in the market only $15 a thousand, would be $30.

2. Or, if A chooses to disregard the express contract, he may sue as upon an implied contract and recover the market value of the lumber actually delivered. Assuming this is $25 a thousand, A could recover $100, but he could not recover for any loss of profits upon the portion undelivered. In case A has contracted to sell this lumber to B at too low a price, this alternative would be preferable.

3. A buys a quantity of turnip seed of B, who represents the seed to be of a particular variety suitable to grow turnips for early market. A plants the seed, and the turnips raised from them are of a late variety, fit only for cattle. A may recover as damages the difference between the market value of the crop he raised and that of the crop he might have raised had the seed been as represented.

In certain classes of cases, where damages would be an inadequate remedy, the injured party may obtain from an equity court an order that the other party specifically perform his promise. Contracts for the conveyance of land are thus specifically enforced, and contracts for the transfer of chattels may be specifically enforced if the chattel is one, like a patented article, which cannot be procured elsewhere than of the vendor.

Actions for the breach of contracts must be brought within the time fixed by the Statute of Limitations. In case of simple

contracts this is usually from three to six years, and in the case of sealed contracts from ten to twenty years. The statutes differ somewhat in the different states. When more than the prescribed time has elapsed since the breach, the contract or right of action upon it is said to be "outlawed," that is, it is barred by the statute. But a debt may be revived by a new promise to pay it after it is barred by the Statute of Limitations, although nearly all the states now require such a promise to be in writing. A part payment after the debt is barred will also revive the whole claim.

IV. Discharge in Bankruptcy

41. Insolvency laws not discharging debtor. At common law debtors could be imprisoned for debt, and such imprisonment might be of indefinite duration. It was not until 1759 that Parliament passed a general and comprehensive act for their relief. This act provided that prisoners in custody for debts under £100 (afterwards extended to £200) might secure their release by making an assignment of all their property, with some trifling exceptions, for the benefit of their creditors; the debtor, however, was not discharged from civil liability for the unpaid portion of his debts. This was the origin of insolvency laws under which, after the abolition of imprisonment for debt, insolvent debtors continued to make assignments for the benefit of creditors in order that all might share *pro rata* in the available assets. These laws were extended in England and in some of our states so as to enable creditors to compel an insolvent to make an assignment of his property for their benefit and to give the debtor a discharge from further liability. When they reach this point they are indistinguishable from bankruptcy laws.

42. Bankruptcy laws discharging debtor. Bankruptcy laws are older than insolvency laws but were originally applied only to traders or persons in mercantile pursuits. They were framed to enable creditors to compel a bankrupt trader to turn over his property for their benefit. They were extended for the benefit of the trader, so that upon turning over all his property

for the payment of his debts the bankrupt became discharged from further liability and could begin business again free from the burden of former debts. They were further extended so as to apply to all persons, whether traders or not, and to enable a debtor to go into voluntary bankruptcy and secure a discharge.

Thus, by an extension of insolvency laws so as to discharge a debtor from his debts as well as from imprisonment, and by an extension of the bankruptcy laws to include all debtors, the two classes of laws became practically alike.

43. The state insolvency laws. Our American states have passed laws which sometimes resemble insolvency laws and sometimes resemble bankruptcy laws. The main distinction to be observed is whether upon assigning all his property for the benefit of his creditors the debtor is discharged from further liability for his debts then existing. If so, the law whatever it may be called is practically a bankruptcy law; if not, it is practically an insolvency law.

Any state law which is in effect a bankruptcy law is now suspended by the National Bankruptcy Law which went into effect July 1, 1898 (see next section).

Any state law which merely governs the voluntary assignment of property for the benefit of creditors, and is to that extent an insolvency law, is not suspended; but a voluntary assignment for the benefit of creditors is an act of bankruptcy and the creditors may bring the assigning debtor under the National Bankruptcy Law if they choose.

44. National Bankruptcy Law of 1898. The Constitution of the United States confers upon Congress the power "to establish uniform laws on the subject of bankruptcies throughout the United States." If Congress does not pass such laws, the states are free to do so. But if Congress does pass such laws, the state bankruptcy laws cease to operate while such national statutes are in force. National bankruptcy laws have been in operation from 1800 to 1803, from 1841 to 1843, from 1867 to 1878, and since July 1, 1898. The state laws are therefore now suspended, but would revive if the federal statute were repealed. If a person is discharged in bankruptcy from his debts, he may

revive any of them by an express promise to pay them. Such promise requires no new consideration; it simply waives the bar raised by the discharge in bankruptcy.

The United States Bankruptcy Law provides that "Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings . . . ; or (4) made a general assignment for the benefit of his creditors; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."

It further provides that "A person shall be deemed insolvent whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, and delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts."

It further provides that (*a*) any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt; (*b*) any natural person (except a wage-earner at a rate not exceeding $1500 a year, or a person engaged chiefly in farming or the tillage of the soil), any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of $1000 or over, may be adjudged an involuntary bankrupt; (*c*) a partnership, during the continuation of the partnership business, or after its dissolution, and before a final settlement thereof, may be adjudged a bankrupt.

It further provides for the discharge of the bankrupt unless he has been guilty of fraud or concealment. The discharge releases him from all his debts *except* taxes, judgments for fraud or for willful injuries, debts not scheduled in time for proof and allowance, or debts created by fraud or embezzlement while acting as an officer or in any fiduciary capacity.

The claims provable against a bankrupt include judgments, open accounts and contracts, and instruments in writing whether yet payable or not, such as promissory notes. Claims that must be enforced in tort actions are not provable unless already reduced to judgment, in which case the judgment is provable.

REVIEW QUESTIONS AND PROBLEMS

Section **32**. Who are liable on contracts? What exception to this rule? How may a third person render himself liable by interfering with a contract? What is a boycott?

33. May a third person (X) sue upon a contract made by A and B? Under what circumstances? May a person not named in the contract between A and B sue upon it? When?

Problem 1. B engages A to make an abstract of B's title to real property. A negligently fails to note on the abstract a recorded mortgage which is a lien on the lands. B wishes to borrow money of X upon mortgage and gives him the abstract which shows the land clear of incumbrances. X loans the money and takes a mortgage. He then discovers the prior mortgage. The land is insufficient in value to pay both mortgages and X suffers loss. He sues A for damages. Can he recover?

34. Why can a person not assign his liabilities? What rights under a contract can one assign? What rights can he not assign? What does the assignee get?

Problem 2. B contracted to sell to X 10,000 tons of ore at the rate of 50 tons a day, to become the property of X when delivered. After delivery the ore was to be sampled and assayed and the price fixed by the daily market quotation. X assigned the contract to C. B refused to deliver to C, who sues B for damages. Is B liable?

Problem 3. B contracted to make certain articles for X to be used by him in his business and to be paid for when delivered. X sold his business to C and assigned this contract to C. B refused to supply the articles to C, who sues B for damages. Is B liable?

Problem 4. B contracts to sing at X's theater. X sells the theater to C and assigns B's contract to C. B refuses to sing, and C sues B for breach of contract. Is B liable?

35. Distinguish assignability from negotiability. To what contracts does the latter apply?

36. What effect does the death of a party have upon a contract? What contract obligations do not survive death? What is the effect of the bankruptcy of a party to a contract? At common law what was the effect of marriage upon a woman's contracts? How is this changed by statutes?

37. How may parties by agreement discharge their contracts? Does a bilateral contract need a new consideration for mutual discharge? Does a unilateral contract? Give an example of substituted contract and of a contract containing provisions for a discharge. What is discharge by

performance? What is the effect of tender of performance? What is legal-tender money? What is the effect of taking a debtor's check? What is the doctrine of substantial performance? What is the effect of promising to perform to the satisfaction of another?

Problem 5. C sold B a horse on condition that B might use it and, if he did not like it, might return it. B used the horse so badly that it was injured. B then offered to return it, but C refused to receive it and sued for the price. Can he recover?

38. Effect of impossibility existing when contract is made? existing and not known? arising subsequently? What three exceptions to the general rule? Explain and illustrate each.

Problem 6. B agreed to sell and deliver to C 607 particular bales of cotton marked and identified. B delivered 460 bales, when the remaining 147 bales were destroyed by fire without fault of either party. C sues B for breach of contract in not delivering the 147 bales. Is B liable?

Problem 7. B engages C as a farm servant. B dies. B's executor refuses to retain C on the farm. C sues the executor for breach of B's contract. May he recover?

39. When will breach by one party discharge the other? What is an anticipatory breach, and what is its effect? When will breach by one not discharge the other? What are divisible contracts? What are independent promises? Effect of breach of warranty?

Problem 8. B bought a quantity of iron of C in January, 1880, to be delivered and paid for on July 15, 1880. On June 12, 1880, B notified C that he would not receive or pay for the iron. C sold the iron elsewhere and sued B at once for damages without waiting until July 15. May he recover?

Problem 9. B engaged C to clean and repair certain pictures at a specified price for each. After C had begun work, B countermanded the order, but C persisted in finishing the work and sued B for the full contract price. Can he recover?

Problem 10. B buys C's farm for $3000 on these terms: $500 down; $1000 in three months; $1500 in six months; the deed to be delivered to C at the end of six months. (*a*) C sues for the $1000 at the end of three months. (*b*) C sues for the $1500 at the end of six months. In each case B defends on the ground that C has not transferred the deed. Result?

40. If A breaks his contract with B, state B's rights and remedies. What is specific performance and by what court granted? What is the Statute of Limitations? How may a debt barred by that statute be revived?

Problem 11. B sells C 10,000 bushels of potatoes at 50 cents a bushel to be delivered in quantities of 500 bushels. B delivers 2000 bushels, when C refuses to receive any more. Assume potatoes to be worth at the time of

breach 60 cents a bushel, how much may B recover of C in case he sues C for breach of the contract? How much may he recover if he disregards the express contract and sues for the value of the potatoes actually delivered?

Problem 12. If in the above problem the market price of potatoes at the time C commits the breach is 40 cents a bushel, what will be the most advantageous remedy for B to pursue?

41. What was the object of the first insolvency laws? How extended?

42. What were bankruptcy laws and for whose benefit were they enacted? How extended?

43. What is now the distinction between insolvency laws and bankruptcy laws? Are bankruptcy laws in force by state legislation? Are insolvency laws?

44. When have national bankruptcy laws been in force? How long has the present one been in force? Give some of its provisions. How may a person discharged in bankruptcy revive his liability?

PART II

PARTICULAR CONTRACTS CONCERNING GOODS

CHAPTER IV

SALES OF GOODS

I. The Contract

45. Definition and analysis. A contract of sale is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price. Where the result of the contract is to transfer the title to the goods to the buyer there is strictly a sale; but where the title is to be transferred at some later time there is only an agreement to sell. The agreement to sell becomes a sale when the title is in fact transferred.

Examples: 1. "I will sell you my horse for $100." "I accept." This is a sale. The title passes at once. If the horse dies, the loss falls on the buyer, even though the horse had not yet been delivered.

2. "I will sell you my colt for $100 when he is a year old." "I accept." This is an agreement to sell. The title remains with the seller until the colt is a year old. It then passes to the buyer and the agreement to sell becomes a sale.

3. The colt dies before he is a year old, without fault of either party. The contract is discharged.

1. *It is a contract.* This implies all the elements heretofore discussed, namely, agreement, competent parties, sufficient consideration, in some cases a particular form, legality, and real

assent. These need not be again discussed at this point, but the nature of the consideration (money) and the form (Statute of Frauds) will call for notice under another head. It is also important to note that where necessaries are sold to an infant, or minor, or to a person under mental incapacity, as a lunatic, he must pay a reasonable price therefor. What are necessaries depends upon the social and financial condition of the infant or lunatic, and upon his actual needs at the time of the sale (see secs. 15 and 16 *ante*).

2. *Whereby the seller transfers or agrees to transfer.* If the seller transfers the property in the goods, the sale is said to be executed; the seller's title is divested; the buyer's title is vested. If the seller merely agrees to transfer the property in the goods, the sale is said to be executory; the seller's title is not disturbed; the buyer has only a right of action under the contract, and he has not any title in the goods. It is one of the important questions in the law of sales as to when the title passes, that is, whether the sale is executed or executory. This will be discussed hereafter. It should be observed that the *contract* may be executory while the *sale* is executed, that is, the agreement to pass title is executed while the rest of the agreements are executory.

Examples: 4. "I will sell you my horse for $100 and deliver him to you to-morrow at your farm, you to pay the money at that time." "I accept." This is an executed sale, that is, the title passes at once to the buyer; but it is still an executory contract, that is, each party has still something to do in the way of performance.

5. If, as above, the seller and the buyer agree, but the seller also agrees to shoe the horse before delivery, the title does not pass until the horse is shod. This is an executory sale and an executory contract.

3. *Property in the goods.* By the term goods is meant, generally, every kind of personal property, such as corporeal movable property, like a horse or a bushel of wheat; incorporeal property, like a patent right or a trademark; *choses* in action, like a stock certificate or a debt. By property is meant the ownership of the goods or the general title to the goods. In order to pass this property to the buyer, it is necessary that the seller should

have it, for the general rule in sales is that "a buyer acquires no better title to goods than the seller had." Three important exceptions to this rule may be noted.

(*a*) In the sale of negotiable instruments the seller may give a better title than he has himself.

(*b*) By the Factors Acts it is provided that a factor or commission merchant who is intrusted with goods by the owner may sell or otherwise dispose of them and give good title as if he were the true owner of the goods or had authority from the true owner.

(*c*) If the buyer leaves the seller in possession of the goods, or of the documents of title to the goods, and the seller resells and delivers them to another innocent purchaser, many courts hold that the latter may retain them as against the first buyer, since the first buyer has made it possible for the seller to commit the fraud. So, if the true owner invests another person with the indicia of ownership, and the latter sells to an innocent purchaser for value, the true owner will be estopped to set up his title against the innocent purchaser.

But if one sells and delivers goods to another, retaining title in himself as security for the purchase money, and the buyer resells them to an innocent purchaser for value, the latter gets at common law no title against the first seller who retained the title. This has led to such hardship upon innocent purchasers that statutes now generally provide that such conditional sales shall be void as against innocent purchasers from the vendee unless they are in writing and recorded in some public office. The retention of title is merely a form of security, like a chattel mortgage, and chattel mortgages are not valid against innocent purchasers of the mortgaged chattels unless duly recorded.

When the seller has been induced by fraud of the buyer to sell his goods and part with the possession, he may rescind the contract and recover the goods. But if, before he does so, the buyer resells them to an innocent purchaser for value, the latter gets a title good against the first seller.

Who is "a purchaser in good faith and for value"? First, one who purchases without notice of his vendor's defective title,

or of facts which should put him upon inquiry concerning the title; and second, one who also pays a valuable consideration. A promise to pay is not sufficient, since, if the true owner recovers the goods, this purchaser will never be obliged to pay his vendor. Whether taking the goods in payment of an antecedent debt owing him from his vendor makes the buyer a purchaser for value, the courts differ. Some hold it does not, because if the buyer has to give up the goods the debt is restored and he is in no worse position than he was before; others hold that it does because the buyer has been "lulled into security," and may thereby lose the debt which he otherwise would have collected. There is the same difference of opinion where the buyer takes the goods from his vendor as collateral security (pledge) for a preëxisting debt. It is generally held that an attaching creditor or an assignee in bankruptcy is not a purchaser for value.

Examples: 6. B sells his horse to C, and C allows B to retain possession. B then sells and delivers the horse to D, who does not know of the previous sale. D may retain the horse as against C, for the latter by leaving B in possession made it possible to commit the fraud, and C must suffer the loss rather than D. (This is not universally held. Some courts regard continued possession by the vendor merely as evidence of fraud, but open to honest explanations.)

7. B owns a wagon. He rents it to C, who paints on it, "C, Piano Mover," and uses it in his business. C sells the wagon to D, who believes C to be the owner. B cannot reclaim it from D. He has invested C with the indicia of ownership. But if B had merely rented the wagon without authorizing C to put his name on it, the purchaser would have obtained no title as against B.

8. B sells and delivers a piano to C, but by the contract retains title until it is fully paid for. C sells it to D for value, D supposing C to be the owner. B brings an action to recover it from D. B will recover unless some statute changes the rule of the common law. (In a very few states the holding is for D without the aid of statute.) But D gets whatever rights C had, and by paying what the latter still owes may acquire title, unless C has already by default forfeited his rights.

9. B sells and delivers buggies to C, a retail dealer in buggies, but retains title in the buggies, and provides that the proceeds of sales by C shall belong to B so far as necessary to pay B. C sells his whole business and stock to D, including these buggies, and B brings an action against D to recover them. It is held that B cannot recover because he has

BILL OF SALE

Know all Men by these Presents,

That I, Richard Atkins, of the city of Lockport, Niagara County, New York, ——— of the first part, for and in consideration of the sum of ten ——— Dollars ($10.00 ——), lawful money of the United States, to ——— me ——— in hand paid, at or before the ensealing and delivery of these presents, by Joseph Dudley, of the same place, ———— of the second part, the receipt whereof is hereby acknowledged, *have* bargained and sold, and by these presents *do* grant and convey unto the said *party* of the second part, ——— his ——— executors, administrators and assigns, the twelfth edition of Kent's "Commentaries on American Law," edited by O. W. Holmes, Jr. ————————————————

To Have and to Hold the same unto the said *party* of the second part, ——— his ——— executors, administrators and assigns forever. And ——— I ——— *do* covenant to and with the said *party* of the second part that ——— I am ——— the *owner* and *have* the right to sell and transfer the said property, and will defend the same against any person or persons whomsoever claiming the same.

In Witness Whereof, ——— I ——— *have* hereunto set ——— my ——— *hand* and *seal* the ——— second ——— day of ——— May ——— in the year One thousand nine hundred and three.

In Presence of
Henry Lathrop

Richard Atkins SEAL

[L.S.]

State of New York,
County of Niagara
City of Lockport } ss.

On this ——— second ——— day of ——— May ——— in the year One thousand nine hundred and three ——— before me, the subscriber, personally appeared ——— Richard Atkins ——— to me personally known to be the same *person* described in and who executed the foregoing instrument, and *he* ——— acknowledged to me that *he* executed the same.

{ NOTARY'S SEAL }

Frank C. Place
Notary Public for Niagara County, New York.

authorized C to sell. There are two inconsistent provisions, — that B shall have title, and that C shall sell and give good title. The latter must prevail as to an innocent purchaser from C.

10. B sells goods to C, who gives B in payment a bill of exchange accepted by X. It turns out that the bill is fictitious, no such person as X being in existence. C resells and delivers the goods to D, and B then seeks to recover the goods from D. He cannot do so. B has a right to rescind the contract with C for fraud and recover the goods while in C's hands. But he cannot recover them from D, who has purchased in good faith from C.

11. B, claiming to act as agent for C, buys goods of D for C, and they are shipped to C. B had no authority and was an impostor. When the goods arrive, B, claiming to act for C, obtains them of the carrier, *and then himself sells them to C and receives the price.* D now asks C to pay him and C refuses. D then brings an action to recover the goods. It is held (1) D sold to C if to any one, not to B; (2) as B had no authority to act for C, and as C refuses to ratify B's unauthorized act, there was a sale by D to no one; (3) as B never had any title to the goods he could confer none on C, and therefore D may recover the goods.

12. B is induced by fraud to sell goods to C, who then transfers them to D in payment of a prior debt owing by C to D. B rescinds the contract with C and seeks to recover the goods from D. In New York B may recover, as it is held that D is not a purchaser for value. In England D is held to be a purchaser for value and B cannot recover the goods.

4. *For a money consideration called the price.* A sale differs from a barter in that in a sale the consideration must be in money, while in a barter it may be other goods, labor, or the like. It is not necessary that the price should be fixed by the contract. It is enough if it is ascertainable, and it may be ascertained by the ordinary market price, or left to some third person to fix or determine.

5. *Bill of sale.* A bill of sale is a formal document, corresponding to a deed of real property, whereby the seller transfers to the buyer the title to specified goods and (usually) warrants the title. It is used in sales of any considerable amount, but may be used in any sale.

46. Statute of Frauds. The seventeenth section of the Statute of Frauds provides that contracts for the sale of goods of the value of £10 ($50) or more must be evidenced either (1) by the acceptance and receipt of the goods or part of them, or (2) by the payment of some part of the purchase price, or

(3) by some note or memorandum in writing signed by the party to be charged or by his lawful agent (see sec. 22 *ante*).

1. *What are goods?* The English statute uses the phrase "goods, wares, or merchandise." Under this it was held that the sale of *choses* in action, that is, shares of stock, contract claims, etc., need not comply with the statute since they were not "goods, wares, or merchandise." The holding in the United States has been generally to the contrary. In many states the statute now expressly names "*choses* in action," and in many the term "personal property" is substituted.

2. *Distinction between contract of sale and contract for work and labor.* It is sometimes difficult to tell whether a contract is one of sale or one for work and labor. If the former, it must satisfy the statute; if the latter, it is not within the statute at all.

Example 1. A goes to B's carriage factory and orders B to make a carriage according to a certain description, for which A agrees to pay $250. When it is finished A refuses to take it and pleads the Statute of Frauds. Is this a contract of sale? If so, B cannot recover against A because there has been no receipt of goods, no part payment, and no note or memorandum in writing. Or is it a contract for work and labor? If so, B may recover against A because such a contract is not mentioned in the Statute of Frauds and is therefore good however made or evidenced. There are three different rules that have been applied to solve this problem. (*a*) The English rule is that if the contract results in the transfer of title to a chattel it is a sale. Under this rule the contract specified is a sale and the statute is a good defense. (*b*) The Massachusetts rule is that if the article is such as the vendor in the ordinary course of his business manufactures for the general market the contract is one of sale; but if made to a special order for a special purchaser, and not for the general market, the contract is for work and labor. Under this rule the contract specified would be for work and labor and the statute would not be a defense. (*c*) The New York rule is that the chattel must be in existence when the contract is made in order that the contract should be a sale, and that although work may remain to be done upon it to adapt it to the buyer's needs, it is still a sale. Under this rule the contract specified would be for work and labor, because the chattel was not in existence when the contract was made.

The English rule looks to the time of performance. The New York rule looks to the time of the formation of the contract. The Massachusetts rule looks to the nature of the contract itself.

3. *Distinction between personalty and realty.* It is also sometimes difficult to tell whether articles attached to lands or buildings are personal property or real property; for example, crops, trees, ice, fixtures, etc. In general, crops raised annually by labor are treated as personalty, while trees, perennial crops, and the like are treated as interests in land. Mineral products generally are realty, but ice has been held to be personalty. If the article sold is treated as realty, then whatever its value there must be a writing. If it is treated as personalty, there need be no formality unless it is of the value of $50, and then a writing may be dispensed with if there be part acceptance and receipt or part payment (see secs. 163, 164 *post*).

Examples: 2. B sold C by parol a growing crop of five acres of turnips for $25, no present payment. B gathered the turnips when ripe and C claimed them. B pleads the Statute of Frauds. The statute does not apply. The turnips while growing, as well as when gathered, are personalty, and not an interest in lands. They are an annual crop, known to the law as emblements.

3. B sold a growing crop of hay to C by parol for $25, with no payment down. B gathered the hay. C claims it. B pleads the Statute of Frauds. Hay is not an emblement or annually planted crop. It is therefore an interest in land, and the contract is unenforceable for want of a memorandum under the fourth section. (But had the contract specified that the title was to pass when the hay was severed, this would have been an agreement to sell personalty, for it contemplated personalty as the subject-matter.)

4. *Acceptance and receipt.* One way of satisfying the Statute of Frauds is by an acceptance and receipt of the goods or a part of them. Both acceptance and receipt are necessary to satisfy the statute, although not necessary to pass title.[1] Acceptance is signifying that the goods are in conformity with the contract. Receipt is taking the goods actually or constructively into the custody of the buyer.

Examples: 4. B buys a quantity of wheat of C, who takes a load to B's warehouse, where it is inspected by B and accepted. B afterwards refuses to take the rest, and when sued pleads the statute. His acceptance and receipt of one load satisfies the statute and C may prove the contract for the whole.

5. Acceptance may take place without receipt. Thus, B inspects the wheat in C's granary and expresses his assent to becoming the owner. If

[1] Upon the requirements for passing title, see secs. 47–49.

this wheat be then delivered to a common carrier, as a railway company, for transportation to B by his direction, there is both acceptance and receipt because the carrier is regarded as agent of the buyer to receive, although not to accept.

5. *Part payment.* If one, instead of accepting and receiving the goods, pays any part of the purchase money, this also satisfies the statute, and he is bound by the contract. In a few states, among them New York, the payment must be made at the time of the making of the contract, but generally payment at any time is sufficient.

6. *The note or memorandum.* There need not be a full and detailed written contract. It is enough if it contain the names of the parties, the subject-matter of the sale, and the agreed price. It may be printed or written, and may be in pencil. It is best that both parties should sign it, for it is uncertain which may seek to avoid the performance. But it is enough that the one who is sought to be charged has signed.

Example 6. B buys of C 20,000 feet of lumber at $10 a thousand feet. B signs the memorandum but C does not. C may maintain an action against B in case he refuses to take the lumber, but B could not maintain an action against C in case he refused to deliver it. If both had signed, then each could have enforced the contract against the other.

An authorized agent may sign for either party. An auctioneer is the agent of both buyer and seller for the purpose of making the memorandum. The note or memorandum may be contained in two or more papers or letters constituting a connected series. It may be made at any time, and need not be made at the time the contract is formed. Some states require the memorandum to be subscribed, that is, signed underneath the writing.

Form of Contract of Sale

This Agreement, made this fifth day of September, 1905, between John Doe, of Ithaca, N.Y., and Richard Roe, of the same place,

Witnesseth, that the said John Doe, in consideration of the agreement hereinafter contained, to be performed by the said Richard Roe, agrees to sell and deliver to the said Richard Roe, at the farm of the said John Doe, five hundred bushels of potatoes of good marketable quality, on the twentieth

day of October, 1905. And the said Richard Roe, in consideration thereof, agrees to pay to the said John Doe the sum of sixty cents a bushel for the said potatoes, immediately upon the completion of the delivery thereof.

In Witness Whereof, the said parties have affixed hereto their respective signatures the day and year first above written.

John Doe.
Richard Roe.

A much simpler form would satisfy the Statute of Frauds, which requires only a note or memorandum. For example:

John Doe has sold to Richard Roe five hundred bushels of potatoes at sixty cents a bushel, to be delivered Oct. 20, 1905.

Ithaca, N.Y., Sept. 5, 1905.

John Doe.
Richard Roe.

If only Doe signed, he would be bound but Roe would not, and *vice versa.*

II. The Title

47. When does title pass? It is important to ascertain the time when title passes from the seller to the buyer. From that moment the risk of loss is on the buyer; he is also entitled to any gain or increase. In case of his death his executor or administrator is entitled to the goods; during his life his creditors may attach the goods. He alone has the full power to sell them and give a good title to the buyer; he may maintain actions of replevin or trover in case of conversion or unlawful detainer by the seller or any other person. On the other hand, the seller, in case title passes to the buyer, may maintain an action for the price of the goods; whereas, if title has not passed, the seller's action would be for damages for breach of the contract to receive and pay for the goods.

In determining the question as to when title passes it is necessary to classify goods into (1) specific or ascertained goods, that is, goods upon which the minds of the parties meet, and (2) nonspecific or unascertained goods, that is, goods described but not actually chosen or specifically indicated.

Example. (1) B purchases all the wheat in C's granary; these goods are specific. (2) B purchases of C one thousand bushels of wheat (no particular wheat indicated); these goods are unascertained. Title to the wheat in the granary would ordinarily pass to B as soon as the contract is

made, because delivery is not necessary to pass title, while title to the one thousand bushels would not pass until the goods are ascertained and appropriated by mutual consent.

48. Specific or ascertained goods. The general and particular rules for determining when title passes in the sale of specific goods are as follows:

1. *General rule.* Where there is a contract for the sale of specific or ascertained goods, the property in the goods is transferred to the buyer at such time as the parties to the contract intend it to be transferred. It thus appears that the intention of the parties is the controlling test. If this is expressed, there can be no doubt. But it is not ordinarily expressed, and the law has therefore certain rules for ascertaining it. In fixing these rules the law looks to the terms of the contract, the conduct of the parties, and all the circumstances of the case.

2. *Particular rules.* Unless a different intent appears, the following rules are applied for the purpose of determining the time at which the title to the goods passes to the buyer.

Rule 1. Where there is an unconditional contract for the sale of specific goods in a deliverable state, the title to the goods passes to the buyer when the contract is made, even though payment or delivery, or both, may be postponed to a future time.

Example 1. B purchases C's carriage for $100 and it is agreed that the carriage shall be delivered and the price paid one week later. The next day the carriage burns up. B must pay the price because the carriage is his under this rule, as much so as if it had actually been delivered to him and he had paid for it. (A very few states hold that a sale for cash is conditional, and that the title does not pass until the price is paid or payment waived. But the better holding is that the title passes, and the seller may retain possession until the price is paid.)

Rule 2. Where there is a contract for the sale of specific goods, and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.

Example 2. B purchases C's carriage and C agrees to have the carriage painted and to deliver it one week later. The next day, and before the carriage is painted, it burns up. B is not bound to pay the price. The loss falls upon C because the title does not pass from him to B until the carriage is painted. The loss falls upon him who has the title. After the carriage is painted the title passes to B even before delivery. In England he must have notice that it is completed, but not in the United States.

RULE 3. Where there is a contract for the sale of goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the title does not pass until such act or thing is done.

Example 3. B purchases all the wheat in C's granary at 80 cents a bushel, and C agrees to measure the wheat in order to ascertain the sum B is to pay. The title does not pass to B until C has measured the wheat. Should it be destroyed in the meantime, the loss would be C's and not B's. But if B agrees to measure the wheat, the title passes to him when the contract is made. (A few states, however, hold that if the weighing or measuring is solely to fix the price, and not to identify the goods, the title passes at the time of the sale. This is the New York rule.)

RULE 4. Where goods are sold and delivered to the buyer with an option to return them the title passes to the buyer subject to be revested in the seller by a return within the time specified, or, if no time be specified, within a reasonable time. This is a case of a sale upon condition subsequent, that is, a right to return or resell to the original seller. It differs from the next case in that the condition there is a condition precedent.

Example 4. B purchases C's mowing machine with the agreement that if it does not suit him C will take it back at the price B paid or agreed to pay. This is a purchase by B and a contract to give B an option to resell to C. The title is in B until he exercises this option.

RULE 5. Where goods are delivered to the buyer "on approval" the title remains in the seller until the buyer signifies his approval. Such approval may be signified expressly or impliedly. If the buyer retains the goods beyond the time fixed, or, if no time be fixed, beyond a reasonable time, he will be regarded as having signified his approval, and title will then

vest in him. The sale of the goods by him would be an approval. It is a matter of construction having regard to all the terms of the contract whether the transaction is "on sale or return" or "on approval."

Example 5. B takes C's mowing machine "on three days' trial and approval." The title is in C until the three days have elapsed.

RULE 6. Where there is a sale of goods in a deliverable condition the seller may by the terms of the contract reserve the title in himself until the price is paid. This right may be reserved notwithstanding actual delivery to the buyer.

Examples: 6. B sells C household goods, retaining title until the goods are paid for. Title, as security at least, is still in B. It is often held that after C has possession the risk as to loss falls upon him, since B's title is in the nature of a security for payment only. It is also the law in many states that in order to protect himself against an innocent purchaser of the same goods from C the seller must file the written contract in some public office.

7. D sells goods to C to be shipped. D in shipping the goods takes the bill of lading (freight receipt) in his own name or deliverable to his own order. Title, as security at least, is still in D. It is often held that title for all other purposes passes to C, and that D merely retains possession or control as security for payment. Such would be the case if title passed to C at the time of the sale. But if the sale was executory, then D's conduct showed an intent that title should not pass until some future time. Sending goods C.O.D. (collect on delivery) is a practical equivalent; the goods are not to be delivered until paid for.

8. F sells goods to G, takes the bill of lading in G's name, attaches it to a bill of exchange (draft) drawn upon G for the price, and forwards the draft and bill of lading. G is bound to accept or pay the draft, or return the bill of lading. If he retains the bill of lading without accepting the draft, he acquires no added right in the goods thereby; but since he is intrusted by F with the bill of lading, he could by a sale to an innocent purchaser confer a good title as against F. The safe course is to forward the bill of lading and draft to a third party, as a bank, with instructions to deliver the bill of lading to G only in case he accepts or pays the draft.

49. Unascertained goods. The following rules govern the courts in determining at what time the title in unascertained goods passes to the buyer under a contract of sale.

RULE 1. Where there is a contract for the sale of described but unascertained goods no property in the goods is transferred

to the buyer until the described goods are ascertained and appropriated to the contract with the consent of both parties.

Exceptions: (*a*) There may be a contract of sale of an undivided share of specific goods, in which case the buyer becomes a tenant in common with the seller or owner of the remaining undivided portion. For example, B purchases one half the wheat in C's granary. Title to an undivided half of the wheat passes at once to B. (*b*) There may be a sale of a definite measure to be taken out of a definite mass of indefinite measure. This case differs from the first in that the sale is not of an aliquot portion, as one half, but of a definite weight or measure out of a specific mass of unknown weight or measure; as 6000 bushels of wheat out of all the wheat in a bin, the total in the bin being unknown. The buyer becomes owner of that undivided portion represented by the ratio of 6000 to the total; if the total be 9000, then the buyer may take title to an undivided two thirds from the time of the making of the contract. Two remarks are to be made upon this exception. First, it applies only to what are called fungible goods, that is, goods like wheat, coal, and the like, which do not have to be dealt with in specie but by weight or measure, and not to goods having individual characteristics like horses. Second, even as to fungible goods the exception has not been everywhere accepted, many jurisdictions insisting that title cannot pass in such cases until the 6000 bushels have been separated from the mass.

RULE 2. Where there is a contract for the sale of unascertained goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods passes to the buyer at the time of such appropriation. Such assent may be expressed or implied and may be given either before or after the appropriation is made. The appropriation must be final and unconditional. If the seller may substitute other goods, it is not final.

Examples: 1. B orders of C 6000 bushels of wheat of a specific description, the same to be measured into a freight car on the siding at C's warehouse. C measures 6000 bushels of the specified description into the car. The title passes to B as soon as the appropriation is thus completed.

2. B buys goods of C from sample. C sets aside in his store goods corresponding with the sample and marks them with B's name. The goods are burned and C sues B for the price. If the appropriation was made by

C with B's consent, the title passed and B is liable. But if the appropriation was not final, — if B had not consented to this form of appropriation, — the title was still in C and B is not liable. This involves questions of fact to be determined in each case.

Rule 3. An unconditional delivery of the goods to a carrier, as directed by the buyer, or as warranted by custom and usage, is always deemed a sufficient appropriation to transfer the title to the buyer; but a delivery by which a bill of lading is made to the order of the seller, or is retained by the seller, or is attached to a bill of exchange drawn upon the buyer, may not pass title. This is explained in Rule 6, sec. 48.

Example 3. B orders of C 6000 bushels of wheat of a specified description. C delivers to a railway carrier 6000 bushels of wheat of this description billed to B, and sends B the bill of lading. The title passes to B as soon as the delivery to the carrier is complete. But if the bill of lading reads "deliverable to the order of C," the title will not pass, because C has thus reserved it in himself. Moreover, if the contract requires the seller to deliver the goods to the buyer at a particular place, the property will not pass until the goods have reached the place agreed upon. Thus, B orders of C the wheat as above, "to be delivered free of charge at my warehouse in the city of X." The title does not pass until the wheat is in the specified warehouse.

50. Who has the risk? Unless otherwise agreed, the goods remain at the seller's risk until the title passes to the buyer. As soon as the title passes to the buyer the goods are at the buyer's risk, whether he actually has possession or not. Risk follows title, is the rule that prevails unless the parties stipulate to the contrary. In determining who has the title the rules given above are to be applied in the absence of an express stipulation.

Exception. If the seller delivers the goods to the buyer, but by the terms of the sale retains title as security for the purchase price, the goods are at the risk of the buyer. For example, B purchases household goods of C upon installment payments, and it is agreed that the title to the goods shall remain in C until they are actually paid for. B has the goods in his house, where they are accidentally destroyed by fire. B must pay for the goods; the risk is with him, although for security the title is with C. It is the same as if title had passed to B and he had then given C a chattel mortgage on the goods as security.

He who has title also has the right to any gain or increase derived from the article. He who bears the risk and burden is also entitled to the benefits.

Example. C purchases B's flock of sheep and leaves them in B's possession, delivery and payment to be later. B shears the wool. C sues B for its value. C may recover. The title passed to him and the wool is his. So if lambs are born of these sheep they belong to C. On the other hand, if any of the sheep die the loss falls on C.

III. Performance

51. Duties of the seller. The duties of the seller in performance of his contract may be briefly enumerated as follows.

1. It is the duty of the seller to deliver the goods in accordance with the terms of the contract. Whether he is to send them or the buyer is to call for them will depend upon the contract. If nothing appears in this respect, the place of delivery is ordinarily the seller's place of business or residence or the place where the goods are at the time of the sale. If no time is fixed, a reasonable time is understood.

2. It is the duty of the seller to deliver the quantity specified. If he delivers less, the buyer may reject them. If he delivers more, the buyer may take what he contracted for and reject the rest, or he may reject the whole. The buyer is not bound to accept delivery in installments, unless he has agreed to do so.

3. It is the duty of the seller to deliver the quality specified. The buyer must be allowed a reasonable opportunity to inspect the goods, if he did not inspect them when he purchased them, and he is not deemed to have accepted them until he has had such opportunity of examining them in order to see if they conform to the contract. He is deemed to have accepted them when he intimates that fact to the seller, or exercises ownership over them, or retains them without dissent after the lapse of a reasonable time. If the buyer rightfully rejects the goods, he is not bound to return them to the seller, but must permit the seller to take them.

4. It is the duty of the seller to confer upon the buyer a good title to the goods.

5. It is the duty of the seller to make good all representations and warranties expressed or implied in the contract of sale. This is more fully explained under Warranties, *post.*

52. Duties of the buyer. The duties of the buyer, after a contract of sale and purchase is made, are as follows.

1. It is the duty of the buyer to accept the goods. If he refuses to do so, the seller may sue for the price if title has passed to the buyer, or for damages if title has not passed.

2. It is the duty of the buyer to pay for the goods. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions. If the price is agreed upon, that must be paid. If no price is agreed upon, a reasonable price, namely the market price, is understood.

IV. Warranties

53. Definition and classification. A warranty is a contract of indemnity made by a seller of goods in favor of the buyer, to protect the latter against the failure of one or more terms of the contract of sale.

A true warranty, that is, an express warranty, is collateral to the main contract of sale. Warranties that are a term in the main contract are really conditions. The latter, however, are often classed with implied warranties and are treated under the general head of warranties.

A warranty may be either express or implied.

An express warranty is a promise or affirmation by the seller of a material fact concerning the goods which has a natural tendency to induce the buyer to purchase them.

An implied warranty (or condition) is one which arises from the acts and conduct of the parties, or from custom or usage, or by operation of law.

Examples: 1. B buys goods of C, who assures B (that is, warrants) that they have fast colors. This is an express warranty. It is not necessary to use the word "warrant" or "warranty." If the colors run, there is a breach of the warranty.

2. It turns out that C did not own the goods. There is a breach of the implied warranty of title which accompanies every sale.

3. D orders of E a quantity of goods by sample. There is an implied warranty (or condition) that the goods when received shall correspond with the sample.

54. Express warranties. The express warranty is gathered from the terms of the contract. If the contract be in writing and unambiguous, the construction is for the court. If the contract be by parol, the construction, unless too clear for any difference of opinion, is for the jury. If the contract is in writing, an oral express warranty cannot, save in very exceptional cases, be added to it. If the seller first makes statements amounting to warranties, and then declares he will not warrant, there is no warranty. But his unexpressed intention not to warrant will not avail him if he uses apt words. It is not his intention but the impression reasonably produced upon the mind of the buyer by his words or conduct that is the test.

The presence of an express warranty will not exclude an implied warranty unless the express warranty be inconsistent with it.

General warranties of "soundness" and the like will not ordinarily cover specific defects obvious to the buyer; but they will cover defects about which a buyer expresses doubt after an examination. A particular warranty will cover a particular defect if intended to do so, although the defect may be patent.

Expressions of opinion or "puffs" do not amount to warranties.

Examples: 1. B in selling a horse says, "This horse is sound." There is visible a large bunch upon the horse's leg. The warranty does not cover this defect, although it does cover other defects not obvious.

2. A buyer in looking at sheep thinks he has discovered foot rot. The seller assures him that he is mistaken and warrants the sheep to be sound. The general warranty covers foot rot.

3. "These sheep will shear from six to ten pounds of wool a head, and you can pay for the sheep in two years from the wool," is a mere statement of opinion or "puff," and the buyer should not rely upon it. So also the statement "This is an A No. 1 bond."

55. Implied warranties. The following are the principal implied warranties that are attached to a contract of sale.

1. *Warranty of title.* There is an implied warranty by the seller that he has a right to sell the goods, that the buyer shall have and enjoy quiet possession of them, and that they shall be free from any charge or incumbrance in favor of any third person; or in other words, a warranty of title. If this warranty is broken and the buyer deprived of the goods, he may recover the purchase price paid, with interest.

Exceptions. This does not attach, however, to a sale made by a sheriff or other person who sells under authority of law, nor, in general, to a sale in which the seller undertakes to transfer only such property as he or the person he represents may have in the goods; as, for example, a sale by an assignee in bankruptcy, an administrator or executor, a trustee, or a mortgagee under a power of sale. But it does attach to the ordinary sales in the business world.

2. *Sale by description.* (*a*) In the sale of goods by description there is an implied warranty that the goods shall correspond with the description. (*b*) If the goods are bought by description from a seller who deals in goods of that description, there is an implied warranty that the goods shall be of merchantable quality.

Examples: 1. B orders of C "early strap-leaf red-top turnip seed" for raising turnips for the market. C furnishes seed which B plants. The crop is late and fit only for cattle. No inspection of the seed by B could reveal that they did not correspond with the description. B has an action against C for breach of the implied warranty that the seed should correspond with the description. It is immaterial that C believed that the seed were of the kind ordered. B may recover as damages the difference between the market value of the crop raised and the market value of the one he would have raised had the seed he ordered been furnished.

2. B orders ice of C to be shipped from Maine to Boston. There is an implied warranty that the ice shall be of merchantable quality. But if B has examined the ice before shipment, there is no implied warranty as to any defect which such examination ought to have revealed.

3. *Sale by sample.* In a sale by sample there is an implied warranty (*a*) that the bulk shall correspond with the sample in quality, and (*b*) that the goods shall be free from any defect

rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

Example 3. B ordered of C certain "corkscrew worsted coatings" to correspond in weight and quality with samples supplied B. The cloth when made up into coats gave way at the seams, owing to some defect in the manufacture. The bulk corresponded with the sample, so there was no breach of that warranty. But it was unfit for the purpose to which such material is ordinarily put, and this was a breach of the warranty of merchantability. B could not reasonably discover this defect from the sample, nor, indeed, from the bulk until the cloth was actually made up into garments.

The buyer must be given a reasonable opportunity to compare the bulk with the sample, and in sales by description he must have reasonable opportunity for inspection.

There may be in the same sale an implied warranty as to description and also as to sample. Such was the case in the example last given. The goods were to be "corkscrew worsted coatings" and were also to correspond with the sample.

4. *Fitness for particular purpose.* Where the buyer makes known to the seller, who is the grower or the manufacturer of the goods, the particular purpose for which such goods are required, relying upon the seller's skill or judgment, there is an implied warranty that the goods shall be reasonably fit for such purpose. In England and in some of our states the implied warranty of fitness extends to sales by dealers who do not grow or manufacture the article; but generally in this country it is confined to growers, producers, or manufacturers.

Examples: 4. B orders of C, a carriage maker and repairer, a new pole for his carriage. The pole breaks, owing to a defect, and the carriage is damaged. C is liable to B for the damages. There is a breach of the implied warranty that the pole shall be reasonably fit for the purpose.

5. B orders of C, a manufacturer of cloths, a quantity of "indigo blue cloth." B is a woolen merchant, but is not known to C to be a tailor. B makes the cloth up into liveries, and the cloth soon shows defects. There was no implied warranty that the cloth was fit for that purpose, because the purpose was unknown to the seller. There might be a breach of the implied warranty of merchantability, but this would depend upon other circumstances. Had the order been "indigo blue cloth suitable for liveries," there would have been an implied warranty of fitness.

6 (*Exception*). A sale of a specified article under its patent or other trade name does not carry an implied warranty for any particular purpose. An order for "your Challenge auger outfit for boring wells" is fully complied with when the "Challenge auger outfit" is furnished. The contract assumes that the buyer knows what are the character and capacities of this article.

5. *Sale of provisions.* The above rules apply to the sale of provisions. But in a few jurisdictions there is an additional implied warranty in the sale of provisions for human consumption, namely, that they are wholesome and fit for food. This is put on the ground of the preservation of health and life, and is applied even where the buyer sees and inspects the article before purchasing. Most courts recognizing this warranty at all limit it to the case where the buyer intends to consume the article and the seller knows this fact; but some extend it even to the case of a sale by a wholesaler to a retailer who intends to resell the article. In no case is the doctrine applied to the sale of food for animals.

Example 7. A sells meat to B, a retailer, who resells it to C for domestic use. Many courts hold that there is no implied warranty by either A or B that it is wholesome. Some hold there is an implied warranty of wholesomeness by B but not by A. It is rarely held that there is such a warranty by A. If either A or B *knew* the meat was unwholesome, he would be liable in deceit for fraudulent concealment.

56. The rule of caveat emptor. The general rule in the law of sales is that of *caveat emptor* — let the buyer beware. This is supposed to have the effect of making men self-reliant and cautious, and of decreasing litigation.

The exceptions to the rule are those enumerated under the head of implied warranties. In those cases the seller assumes the risk instead of the buyer, and without any express stipulation. In all other cases, if the buyer does not wish to assume the risk, he should exact an express warranty. In the sale of specific chattels examined by the buyer there is usually no implied warranty except as to title. But if the character of the article cannot be ascertained by examination (as in the case of seeds) there is an implied warranty that the article shall possess the necessary characteristics of such articles.

57. Remedies for breach of warranty. In discussing the remedies for breach of warranty it is necessary to distinguish between express warranties and implied warranties.

1. *Express warranties.* In England and in New York and many of our other states a buyer to whom title has passed cannot rescind the sale for breach of an express warranty. He is confined to an action for damages for the breach. In Massachusetts and some other states he may either rescind the sale, that is, return the goods and recover the price, or he may keep the goods and sue for the breach of the warranty. This conflict of authority concerning the right to rescind the sale for breach of an express warranty is very sharp and can be settled only by some uniform statute adopted by the states. The reason given for denying the right is that the contract of warranty is collateral to the main contract of sale, and its breach should not affect that contract. If, however, the warranty is fraudulent, that is, if the seller knew it was false, the contract may be afterwards rescinded for the fraud.

If the title has not passed to the buyer, he may refuse to receive the goods upon discovering a breach of the express warranty.

Examples: 1. B sells and delivers timber to C and innocently warrants it to be sound. C discovers the timber is unsound, offers to return it, and demands back the purchase money. He then sues for the purchase money. In New York he will fail; he can recover only the difference in value between the timber as warranted and as it was in fact. In Massachusetts he will succeed, upon returning the timber, in recovering the whole purchase money.

2. B knows the timber is unsound and makes the warranty. This is fraud and B may rescind and recover the whole purchase price.

3. E sells F a buggy which he innocently warrants to be new and sound, and agrees to repaint the wheels. F discovers the buggy to be an old one and unsound. F may refuse to receive it because the title has not yet passed to him.

2. *Implied warranties.* For the breach of an implied warranty the buyer may at his election either (*a*) rescind the sale and recover the price or (*b*) receive and keep the goods and sue for damages for the breach, or, in case the price is

unpaid, set up these damages to diminish the price. In order to rescind, the buyer must act promptly or within a reasonable time. If the seller refuses to receive the goods upon a rescission, the buyer may hold them as bailee for the seller.

Examples: 4. B orders goods of C by description. When the goods arrive B discovers that they do not answer the description. He may reject them, or (except in New York) he may take them and sue for damages if he has paid the price, or deduct the damages from the price if it is yet unpaid. [In New York, upon a sale by description where the quality is discoverable by inspection, an acceptance by the buyer after such inspection deprives him of any remedy against the seller for breach of warranty. His only remedy is to reject the goods. Acceptance is treated as an admission that the goods do correspond with the description. This rule is peculiar and local.]

5. (*a*) B orders of C a machine for a particular purpose. B sets it up and finds it unfit for the purpose. B may reject it if he acts with promptness after such test, or he may keep it and sue for damages for breach of the implied warranty. (*b*) So if B orders a chemical he may use enough of it to determine whether it answers the description, and, if it does not, he may reject the remainder without being required to pay for what he has reasonably used in the test. (*c*) But if he can determine the quality without using any, he waives his right to reject the bulk by consuming any portion of it.

6. The damages recoverable upon a breach are all the losses directly and naturally resulting from it. B orders from the maker, C, a refrigerator suitable for keeping dressed poultry. The refrigerator furnished by C is not suitable for the purpose and the poultry spoil. B's damages include the difference between the value of the refrigerator ordered and the one delivered, and also the loss incurred by the spoiling of the contents. See also the case of the sale of the turnip seed, p. 83 *ante*.

V. Remedies

58. Rights of unpaid seller against the goods. Although the title to the goods may have passed to the buyer, the unpaid seller is entitled to the following rights.

(1) If the seller is still in possession of the goods, he has a lien on them or a right to retain them until the price is paid, unless he has sold on credit and the term of credit has not expired.

(2) If the seller has shipped the goods and he afterwards learns of the insolvency of the buyer, he has the right to stop the goods *in transitu* before they reach the buyer and thus regain possession of them.

(3) If the seller has a lien or has stopped the goods *in transitu*, as above, (*a*) he may resell the goods in case the buyer delays an unreasonable time to pay for them, or at once if the goods are perishable, and if they sell for less than the buyer agreed to pay, may recover from him as damages the difference; or (*b*) he may rescind the sale and transfer of title, and may resume the title himself in case the buyer delays an unreasonable time to pay the price, and may also recover from the buyer as damages any loss occasioned by the buyer's default.

Seller's lien. The seller's lien exists when he has sold for cash down; or when, having sold on credit, the term of credit has expired before delivery; or when, having sold on credit, the buyer becomes insolvent before delivery. He loses his lien by delivery to the buyer or his agent, or by delivery to a carrier without reserving in the bill of lading the right to possession, or by a waiver of the lien. He cannot hold the goods for any claim except the purchase price, nor after valid tender of the purchase price.

Stoppage in transitu. Goods are in transit after delivery to a carrier and before delivery to the buyer, and may be stopped by the unpaid seller in case the buyer becomes insolvent. The transit ends, however, if the carrier consents, after the arrival of the goods at their destination, to hold them for the buyer, or if the carrier wrongfully refuses to deliver them to the buyer upon demand. The unpaid seller exercises his right of stoppage *in transitu* by giving reasonable notice to the carrier.[1] It is then the duty of the carrier to redeliver the goods to the seller, and the duty of the seller to pay the transportation

[1] To the X.Y. Railroad Co.: Circumstances having arisen which give to me the right of stoppage *in transitu*, I hereby direct you to hold, subject to my orders, the goods delivered to you on Dec. 31, 1904, at Ithaca, N.Y., and consigned to John Doe, Buffalo, N.Y., and not to deliver the same to the consignee.

Ithaca, N.Y., Jan. 5, 1905. RICHARD ROE.

charges. But if the carrier has issued a negotiable bill of lading, this must be surrendered or a sufficient bond be given to protect the carrier from any claim arising under it. If, however, such negotiable document of title has actually been transferred by way of sale to an innocent purchaser for value while the goods are in the hands of the carrier, and before the seller's right has been exercised, his right of stoppage *in transitu* is ended. But a sale of the goods by the buyer, where there is no such documentary title, will not defeat the seller's right.

Resale. The seller's right of resale is exercised as agent by operation of law for the buyer. The purchaser at the resale gets a title good against the original buyer. Notice of the intention to resell need not necessarily be given to the buyer, but it is always safer to give it. Notice of the actual time and place of the resale need never be given.

Rescission. Notice of rescission of the contract and retransfer of title to the seller is not absolutely essential but is highly desirable. Some overt act showing an intention to rescind, as, for example, the consumption of the goods by the seller, is essential.

Examples: 1. B sold lumber to C and took C's note for thirty days. The lumber remained in B's possession. C sold the lumber to D. When D came for it, B refused to deliver it because C had become insolvent. B has asserted a valid right. Although a sale on credit waives a lien, the lien revives if the buyer becomes insolvent. D got no better right than his vendor (C) had.

2. B sold tobacco to C, who then, unknown to B, was insolvent. B consigned the tobacco to C and sent C a bill of lading. C failed and transferred the bill of lading to D, his assignee in bankruptcy. B then stopped the goods in the carrier's hands. D claims them. In this case B will get the goods. An assignee in bankruptcy is not a purchaser for value, as he parts with nothing. But if C or D had sold and delivered the bill of lading to E before B stopped the goods, B's right would have been gone.

3. B sold C a diamond for cash. C would not pay cash on delivery and B retained the diamond. Afterwards B sold it to D for $40 less than C had agreed to give. B may recover this $40 of C, provided he sold in good faith according to usage and for the highest price obtainable.

4. In the above case B sold the diamond for $30 more than C had agreed to give. C claims this $30. (*a*) If B sold as agent of C, he should account

to C for the profits. (*b*) If B rescinded the contract, the diamond became his and he is entitled to the enhanced price; but of course he has now suffered no damage for which he can sue C.

59. Rights of unpaid seller by way of action for breach of contract. The unpaid seller has the following remedies against the delinquent buyer.

1. *Action for the price.* If the property in the goods has passed to the buyer, the seller may maintain an action for the price; so also if by the terms of the contract the price is to be paid before the property in the goods passes to the buyer. If the goods have no ascertainable market value, the seller upon tender of them and refusal of the buyer to accept them may hold them as bailee of the buyer and may maintain an action for the price. In some states, as in New York, he may do so in the case of any goods, while in England and in some states the rule is not recognized at all.

2. *Action for damages for nonacceptance.* If the buyer unreasonably refuses to accept the goods, the seller may maintain an action against him for damages for nonacceptance. In New York he may tender the goods and sue for the full price, but this is not the usual rule. The measure of damages is the loss to the seller. If there is an available market, the loss is the difference between the contract price and the market price.

Examples: 1. C sells B a wagon for $50, delivery and payment to be one week later. Title passes to B. If he refuses to take the wagon, C may sue and recover the price. Moreover, if B refuses to take the wagon, C may, according to some authorities, charge him for the storage and care of it.

2. C agrees to build a wagon for B according to a certain plan and description. When it is completed according to the contract, C tenders it to B and the latter refuses it. (*a*) According to most authorities C's only remedy is damages for breach of contract, since no title has passed to B and the wagon is still C's. (*b*) But in New York and a few other states C may tender the wagon to B; title will then pass, and C may sue for the price.

60. Remedies of the buyer. The buyer may be the owner of the goods or the title may not have passed. His remedies will be more numerous in the former case than in the latter.

1. *Remedies as owner.* If the property in the goods has passed to the buyer, and the seller wrongfully refuses to

deliver the goods, the buyer may treat the seller as having converted them. This allows the buyer to replevin the goods, thus actually getting possession of them, or to sue in tort for conversion, thus getting their value in money.

2. *Action for damages for breach of contract.* If the property in the goods has not passed to the buyer, and the seller wrongfully refuses to deliver the goods, the buyer may maintain an action for damages for nondelivery. The measure of damages is the loss resulting naturally to the buyer. If there is a market, the measure is ordinarily the difference between the contract price and the market price at the time delivery was due; these are called general damages. Damages may be increased by knowledge communicated to the seller, at the time the contract is made, of the use to which the buyer intends to put the goods; these are called special damages.

Examples: 1. B purchases 1000 bushels of wheat of C, to be delivered September 1, at 80 cents a bushel. C refuses to deliver on that date, and wheat is then 90 cents a bushel in the same market. B's damages are 10 cents per bushel, or $100.

2. B orders of C a shaft to replace a broken one in his mill, and notifies C that the mill must be idle until the shaft is delivered. C agrees to deliver it by a certain date, and fails to do so. B may recover as special damages the loss resulting from the idleness of the mill while he is with due diligence procuring another shaft after C's failure to deliver at the appointed time. But for such notice to the seller, B's damages would be merely the difference between the price he agreed to pay C for the shaft and the price he is obliged reasonably to pay for one elsewhere.

3. B bought goods of C, to be delivered January 15, informing C that he wished to put his salesmen on the road on that date with the goods. C delayed delivery and B's salesmen were two weeks idle in consequence. B may recover the loss of profits on resales due to the delay of C. So if B to C's knowledge had resold the goods to D, to be delivered January 20, and had to pay damages to D for nondelivery, he could recoup these damages from C. But these results ensue only when C has express notice of the use to which B intends to put the goods and the contract is made in contemplation of that.

3. *Action for breach of warranty.* This has already been discussed (see sec. 57 *ante*).

REVIEW QUESTIONS AND PROBLEMS

SECTION **45**. Define contract of sale; executed sale; executory sale. What are "goods"? In what cases may a buyer get better title than the seller had? When not? Who is a purchaser in good faith and for value? Is an antecedent debt value? Distinguish sale and barter. How may the price be fixed? What is a bill of sale? Draw a bill of sale of a pair of horses, buggy, harness, whip, lap robe, for $350.

Problem 1. B, in the name of C, orders goods of D, who supplies them supposing he is dealing with C. After B gets the goods he sells them to E, who has no knowledge of B's trick. D then brings an action to recover the goods from E. Result?

Problem 2. B is induced by fraud to sell and transfer goods to C, whose creditors then seize the goods. B seeks to recover the goods from the creditors. Can he do so?

Problem 3. In the above case C pledges the goods to a creditor as security for a preëxisting debt. Can B recover them?

46. What is the seventeenth section of the Statute of Frauds? What are "goods, wares, and merchandise"? Are *choses* in action goods? How can you tell whether a contract is for the sale of goods or for work and labor? State the different tests. Is grass realty or personalty? What difference does it make? What constitutes acceptance and receipt? What is part payment? What should the note or memorandum contain? When may it be made? What is signing? What is subscribing? Write a contract of sale.

Problem 4. C agreed orally to make for B a set of artificial teeth for $75, and B agreed to pay C that sum. When the teeth were finished B refused to take them. C sues for the price. B pleads the Statute of Frauds. Result?

Problem 5. B orally agrees to cut and deliver to C certain trees standing on B's land for the price of $15. B refuses to perform, and when sued sets up the Statute of Frauds. Is B in the right?

Problem 6. B writes C, "Please quote price of brass hoops." C wrote B a letter in regard to other matters and added an unsigned postscript as follows: "P.S. Will make price of hoops 17¢ lb." B answered, ordering two tons. C replied, acknowledging the order. All the writings were subscribed except the postscript. If the statute requires the memorandum to be subscribed, are these letters a sufficient memorandum?

Problem 7. B examined barrel hoops at C's factory and agreed orally to purchase a quantity for $200. B told C to deliver them at the steamer

Curlew for transportation. C delivered them at the steamer. The *Curlew* was lost at sea with her cargo. C sues B for the price. B sets up the Statute of Frauds. Were the goods "accepted and received" by B?

Problem 8. B bought a carriage of C for $350, but it remained in C's possession, and there was no payment and no memorandum. Some changes were ordered after which B inspected the carriage and approved it. Later B hired a team of horses and drove out in the carriage but returned it to C's warehouse. He then refused to take and pay for it. C sues B, who pleads the Statute of Frauds. Result?

Problem 9. B goes into a store and buys on credit dress goods and trimmings amounting to $124. Among the purchases is a spool of thread at five cents. B takes the spool of thread home. Later she refuses to take the goods and pleads the Statute of Frauds. What result?

Problem 10. B and C made an oral contract for the sale and purchase of goods of the value of $2500, and each deposited $200 in the hands of X, to be forfeited by the party who should refuse to perform the contract. B refused to perform. C sues B for breach, and B pleads the Statute of Frauds. C replies that there was part payment. Result?

47. Why is it important to determine when title passes? What are specific goods? What are unascertained goods? Illustrate.

48. State the general rule as to when title passes in the sale of specific goods. State the six particular rules. Illustrate each.

Problem 11. C sold lumber to B which the parties culled out and agreed upon. C agreed to deliver it at the cars. There was a written memorandum. While still in C's yard the lumber burned. C sues B for the price. Did the title pass to B so as to make the loss his?

Problem 12. Sale of 119 specific bales of cotton at 31¼ cents a pound, payable cash on delivery, the cotton to be weighed and sampled before delivery. Seventy bales are weighed and sampled, but not delivered, when the whole 119 bales are destroyed by fire. Is the buyer liable for the 119 bales? Is he liable for the 70 bales?

Problem 13. X sells B 238 bags of coffee, marked and designated, but X agrees to weigh the bags in order to ascertain the total price, the sale being by the pound. Has title passed to B?

49. State the rules to determine when title passes in the sale of unascertained goods. What are fungible goods? When is an appropriation final?

Problem 14. B purchased of C 200 bushels of corn out of a lot of 400 to 500 bushels in C's crib. It was to be left until it hardened, and then C was to measure and deliver it. C's creditors levied on the whole lot. C then delivered 200 bushels to B, and the creditors seek to recover the corn from B. Result?

Problem 15. In the above case the crib burns and all the corn is destroyed. Must C pay B for the 200 bushels?

Problem 16. Assume in Problems 14 and 15 that C has agreed to deliver the corn and that B sues for breach of this promise. May he recover?

Problem 17. C orders by mail a barrel of shellac of B, who selects a barrel answering the description and ships it to C by the X. Ry. as directed. In transit it is lost. May B maintain an action against the X. Ry. for its loss?

Problem 18. In the above case B took the bill of lading in his own name and retained it. Can B sue the X. Ry. for the loss?

50. Where is the risk of loss after a contract of sale? Where is the right to gain or increase? Do these rules apply to a sale and delivery when seller retains title as security for payment?

51. State the duties of the seller. Where is delivery to be made? If the buyer orders 50 barrels of apples and the seller delivers 48 barrels, must the buyer take them? How is it if the seller delivers 55 barrels? If the seller delivers 50 barrels, what right has the buyer?

52. State the duties of the buyer.

53. Define warranty; express warranty; implied warranty or condition. Which are a part of the main contract of sale and which not?

54. Does an express warranty arise without words? Who determines whether there is an express warranty? What is the test? What is a "puff"?

Problem 19. B sold a horse to C. During the negotiations B represented the horse to be sound. It was unsound. C sues B for breach of warranty. B objects that he did not "warrant" the horse. Result?

55. State the implied warranties and when they occur. When is a warranty of title not implied? When is there warranty that goods are merchantable? Is there a warranty of fitness for the purpose in a sale by a retailer? Is there any special implied warranty in the sale of provisions?

Problem 20. B stole a horse and had him sold at auction. C bought at the auction and then resold the horse to D. The true owner traced it and recovered it from D, who now sues C for breach of warranty of title. Result?

Problem 21. B sold C 184 bales of hemp, and C at the time of the sale inspected it before purchasing by opening several bales. Most of it later turned out to be bad. C sues B for breach of implied warranty. Result?

Problem 22. C orders of B "Calcutta linseed." It came mixed with rape and mustard seed. All linseed has some such seeds mixed with it; this had more than the usual quantity. C contends that the contract is not satisfied by offering this article, — that it does not answer the description. How would you hold?

Problem 23. B bought of C a car load of cedar posts to be shipped by C to B. When they arrived B's servants unloaded a part of them, and discovering they were not of good quality so informed B. The latter then inspected them, and because they were not of good quality had those taken from the car replaced, and refused the whole lot. C sues B for the price. Is B liable?

Problem 24. C bought of B by sample "102 bales second quality Ceará scrap rubber as per sample." When the bales arrived they were found not to be second quality, but inferior, though they were like the sample. Is C bound to keep the rubber and pay for it without offsetting the damages for breach of warranty?

Problem 25. (*a*) A manufacturer sells B powder for blasting. It is of poor quality and unfit for the purpose. Is there a breach of warranty?

(*b*) A dealer who purchased of the manufacturer sold C some of the same powder for the same purpose. Is the dealer liable to C for breach of warranty?

56. What is meant by the rule of *caveat emptor?* What are the exceptions to the rule? If A sells B a horse without express warranty, is there any implied warranty? If A sells B seeds?

57. Can the buyer rescind the contract for a breach of an express warranty if title has passed? for breach of an implied warranty? If goods are ordered by description and they do not answer the description, may the buyer take them and sue for breach of implied warranty?

58. State all the rights of an unpaid seller against the goods. What is the seller's lien? How is it lost? What is the right of stoppage *in transitu?* When may it be exercised? How is it lost? Explain the exercise of the right of resale; of rescission.

Problem 26. B sells C a horse, payment and delivery to be one week later. At the time fixed C does not take or pay for the horse. Explain all the remedies to which B may resort against the property itself.

Problem 27. B sells C a horse on credit, delivery to be one week later and payment one month later. What are B's rights against the property?

59. State the seller's rights against the buyer. How does he measure his damages for a breach?

60. State the remedies of the buyer (*a*) where the title has passed and (*b*) where it has not passed. What are general and what special damages? When may special damages be recovered?

CHAPTER V

BAILMENT OF GOODS

61. Definition and distinctions. A bailment[1] of goods is a transfer of the possession without a transfer of the general ownership, upon a contract, expressed or implied, that after the purpose of the transfer shall have been accomplished the property shall be redelivered to the bailor or to some person designated by him.

The person making the delivery is called the bailor. The person to whom it is made is called the bailee.

Such a transfer of possession usually occurs by delivery from the bailor to the bailee. It may take place, however, without such delivery.

Examples. If one finds an article and takes it into his custody, he is a bailee for the unknown owner, although there has been no delivery, and is under an obligation created by the law to return it to the true owner upon demand. So if one steals or converts property belonging to another, he is a bailee, and the law creates for him a promise to return it to the owner. So also an officer who seizes goods under a legal process is a bailee of the goods. In all these cases there is a transfer of possession without delivery, but in all of them the bailee is bound to deliver up the property either upon demand or when the purpose for which he has taken it is accomplished.

The duty of the bailee is usually fixed by his own promise, and is therefore the result of contract. But in the cases last given there is no promise and no real contract. The law treats these cases upon the fiction that there is a promise, that is, the law creates the promise and requires the bailee to return the goods or pay damages for withholding them.

The consideration for the bailee's promise is the detriment suffered by the bailor in parting with his property. Sometimes the bailor furnishes some other consideration, as when he pays or promises to pay the bailee for caring for the property or doing work upon it. But in the case of a gratuitous bailee —

[1] Bailment is from the French *bailler* to deliver.

one who cares for the property without compensation — the only consideration is the parting with the property by the bailor. This is an act which the owner is not legally bound to do, and is therefore a sufficient consideration.

Bailment applies only to personal property. This may be corporeal, as a horse, or incorporeal, as a document of title.

The bailor need not be the true owner of the property. One may hire a horse and put him in a livery stable; in such a case there are two bailments, — by the owner to the hirer, and by the hirer to the livery-stable keeper. One who finds a jewel may deliver it to a jeweler to be tested; in such a case the finder is bailor and the jeweler is bailee, and the finder may recover the jewel, or its value, if the jeweler refuses to surrender it. The bailee cannot dispute his bailor's title.

Distinctions. A bailment must be distinguished from a sale or barter.

A bailment differs from a sale in this: in a sale there is a transfer of the general ownership or title, while in a bailment there is the transfer of possession for a particular purpose, the general ownership or title remaining in the bailor.

A bailment differs from a barter for the same reason. Further, in a bailment the identical thing is to be returned, though sometimes in an altered form, while in a barter some other thing is to be returned. If one delivers grain to be ground into meal and the meal returned, this is a bailment. But if one takes his grain to a mill and receives therefor meal already ground, this is a barter or sale. If one "lends" his neighbor a bag of oats to feed the neighbor's horse, this is a barter because the same oats are not to be returned but a like quantity of oats; this is technically called a *mutuum*.

Sometimes there is a bailment with an option to purchase, as where there is a "sale on approval" (see p. 76, *ante*). In such case the transaction becomes a sale when the bailee signifies his approval.

Sometimes there is a bailment with permission to mix the goods with others of a like kind, as where grain is placed in an elevator with the grain belonging to other bailors. The owners become owners in common of the mass, according to their respective shares. If there is no such permission, express or implied, the bailee must keep the bailor's goods separate from his own or others'.

62. Classification of bailments. Bailments fall into two classes, and each has subdivisions. The two classes are (I) bailments solely for the benefit of one party, and (II) bailments for the mutual benefit of both parties.

(I) Bailments solely for the benefit of one party, or gratuitous bailments, are divided into two classes.

1. Bailments for the sole benefit of the bailor are called either a deposit (or in the Roman law, *depositum*) or a mandate (or in the Roman law, *mandatum*). These are bailments in which the bailee without compensation is to keep the property of the bailor for him (deposit), or to do something to or about the property for the bailor's benefit (mandate).

Examples. C undertakes without reward to keep D's jewels. C without reward undertakes to repair D's watch. C without reward undertakes to carry D's grist to mill. The first case is a deposit. The others are mandates.

2. A bailment for the sole benefit of the bailee is called a *commodatum*, that is, a gratuitous loan. This is a bailment in which the bailor without compensation allows the bailee to use his property.

Examples. D loans C a jewel to wear, or D loans C his horse to drive, without compensation.

(II) Mutual benefit bailments may be divided into three classes, with two additional special instances.

1. The delivery of a chattel as security for a debt. This is called a pawn or pledge, or giving of collateral security (in the Roman law, *pignus*).

Examples. D borrows money of C and delivers his watch to C as security. D borrows money of a bank and delivers bonds or shares of stock as collateral security.

2. The delivery of a chattel to the bailee to be used by him and such use paid for. This is like the second case given above, except that the bailee is to compensate the bailor. It is called a hiring, or, in the Roman nomenclature, *locatio rei*, the hired use of a thing.

Examples. D loans a jewel to C to wear, or D loans his horse to C to drive, in each case for a stipulated price.

3. The delivery of a chattel to the bailee to keep safely, or to do work upon, for a compensation. This is like the first case

given above, except that the bailee is to be paid instead of acting gratuitously. This is called a hiring (of services), or, in the Roman nomenclature, *locatio operis*, hired services about a thing. There are three special instances of this: (*a*) hired custody of a thing (*locatio custodiae*); (*b*) hired services upon a thing (*locatio operis faciendi*); (*c*) hired carrying of a thing (*locatio operis mercium vehendarum*).

Examples. C undertakes for a price to keep D's jewels safely. C for a price undertakes to repair D's watch. C for a price undertakes to carry D's grain to mill.

The following special cases of delivery for safe keeping or for transportation fall under mutual benefit bailments but call for separate treatment.

1. Innkeepers. The intrusting of goods to the protection of an innkeeper by a guest at the inn gives rise to peculiar liabilities.

2. Common carriers. The delivery of goods by a shipper to a common carrier for transportation gives rise to peculiar liabilities.

The following special cases do not fall strictly under bailment but may be treated here for convenience.

1. Public carriers of passengers and baggage.
2. Telegraph and telephone companies.

The classification of bailments may be thus summarized:

CLASSIFICATION OF BAILMENTS

I. Gratuitous.
   1. Gratuitous services.
      a. Deposit.
      b. Mandate.
   2. Gratuitous loans.

II. Mutual Benefit.
   1. Pledge or pawn.
   2. Hired use of a thing.
   3. Hired services about a thing.
      a. Custody of a thing (with special case of innkeepers).
      b. Work upon a thing.
      c. Transportation of a thing (with special case of common carriers).

I. BAILMENTS SOLELY FOR BENEFIT OF ONE PARTY

63. Bailments for sole benefit of bailor. These bailments lay on the bailee the lightest duties, since he derives no benefit from them.

1. *How created.* This bailment may be created by contract, as where, upon the bailee's promise to care for the article gratuitously, the bailor delivers it to the bailee. Some writers do not regard this strictly as contract because the only consideration for the promise is the parting with possession by the promisee. It is, however, convenient to treat the relation as the result of contract.

This bailment may also be created by a voluntary undertaking of the bailee without any action on the part of the bailor, as, for example, where one finds lost property and takes it into his possession.

It may also be created without a voluntary undertaking of the bailee, as where goods are cast by a flood or other force of nature upon the lands of the bailee.

2. *Bailor's obligations.* As these are gratuitous bailments the bailor is not bound to compensate the bailee for his services in the care of the property or for any work done upon it. But if the bailee has not by agreement undertaken to bear unusual expenses, the bailor must indemnify him for such actual disbursements. The voluntary bailor is also bound to warn the bailee of any danger of which the former is aware, if such danger increases the ordinary risk of the bailment, and is not apparent to the bailee.

Examples: 1. C undertakes without compensation to keep and feed D's dog. C is obliged to pay a dog tax. D must reimburse C.

2. C undertakes without compensation to take and care for D's dog. Known to D but unknown to C the dog is vicious. C is bitten by the dog. D is liable to C for the injury. But D would not be liable if he did not know of the vicious propensities of his dog or if he warned C of them.

3. *Duties of bailee.* The bailee is not bound to undertake the bailment even after he has promised to do so. This is because there is no consideration for his promise, since the bailor has

promised him nothing in return. But if the bailee does undertake the bailment by receiving the goods, he then comes under certain obligations to the bailor.

(*a*) The bailee must not by gross negligence injure, destroy, or lose the goods. It is said that since the bailee is acting gratuitously he is bound to use only slight care toward the subject of the bailment and is liable only for gross negligence. Whatever this may mean, — and it is a matter difficult to define accurately, — it is clear that less care is exacted of the gratuitous bailee than of any other. The amount of care must, however, vary in proportion to the risk.

Example 3. More care would be required in the keeping of a diamond than in the keeping of a plow; more skill and care would be required in the repairing of a watch than in the repairing of an umbrella. The court instructs the jury that the gratuitous bailee is required to use only slight care and is liable only for gross negligence, that this is the care that persons of less than ordinary prudence, but still of prudence, exercise under like circumstances, and that whether the bailee exercised this care in the case in litigation is a question of fact for the jury to determine.

(*b*) The bailee must not use the article except so far as its use is reasonable or necessary for its proper care. The bailee might drive a horse to keep it in health, or milk a cow, but he could not use the horse for plowing his own field, or wear a diamond intrusted to him.

(*c*) The bailee must redeliver the article at the termination of the bailment, together with any increase or profit derived from it. If it has been lost, the bailee is liable only if the loss was due to his gross negligence.

Examples: 4. B undertakes gratuitously to keep C's furs. He keeps them so negligently that the moths injure them. B is not liable unless this is found to be gross negligence.

5. B wears the furs and loses them. B is liable. He had no right to use the furs, and in doing so assumed the entire risk of their safety.

6. B undertakes gratuitously to keep C's jewels. B locks them up in his desk. Burglars break open the desk and steal the jewels. B is not liable unless he was grossly negligent, which could hardly be the case under these facts.

7. B leaves the jewels in an unlocked drawer and they are stolen. This might be gross negligence.

4. *Termination of bailment.* The bailment is terminated whenever either party elects to terminate it. This is, perhaps, subject to the qualification that if the bailee has entered upon some work to be done upon the article he is bound to finish it. The death of either party terminates the bailment. So also does the insanity of either.

64. Bailments for bailee's sole benefit. These bailments lay on the bailee the heaviest duties, since he alone benefits from them.

1. *How created.* This form of bailment arises only by contract; because it requires the assent of the bailor to lend and the assent of the bailee to borrow. A promise to lend is not binding because there is no consideration for it; but after the loan is made the contract is complete. The absence of compensation to the bailor characterizes this class of bailments.

2. *Obligations of bailor.* The sole obligation of the bailor is to warn the borrower of any defect known to him and not known or obvious to the bailee, which renders the article dangerous. If he does not, and the bailee is injured in consequence of such defect, the bailor is liable to him for the injury.

Example 1. B lends his horse to C to drive. Known to B but unknown to C the horse is a runaway. If B does not warn C of this, and the horse runs away and injures C, B is liable.

3. *Duties of the bailee.* The obligations of the bailee may be fixed by the contract itself. Where they are not specified, the following will be implied.

(*a*) The bailee must exercise great care in keeping or using the article, and is liable for slight negligence. The bailment being for the bailee's sole benefit, the law exacts of him greater care than in the case of any other bailee. He is not liable for inevitable accident but only for such injuries as by the exercise of great diligence he could have prevented. In the presence of any danger he ought to prefer the safety of the borrowed article to the safety of his own property. In this respect this bailment is at the opposite extreme from the one for the bailor's sole benefit.

Example 2. C loans B his watch. B loses it. If this was due to a want of great care (more than one ordinarily takes of his own property), B is liable to C. This is a question for the jury under proper instructions.

(*b*) The bailee may, of course, use the article, but he must not lend it to others unless it is understood that he may do so, and must use it in accordance with the contract or understanding. Any material deviation may cast upon him the liability of insuring the safety of the article or may render him liable in tort for its conversion.

Examples: 3. C borrows D's horse to drive to A, and drives instead to B in another direction. The horse dies without C's fault. C must pay for the horse. He has technically converted it and is absolutely liable. If the horse had died without C's fault while he was driving to A, he would not have been liable.

4. C borrows D's horse to drive and permits E to drive it. C is absolutely liable for any injury to the horse while in E's hands. But it may be implied that another is to use the article. If C takes D's horse in order to try him before buying, C may permit a competent horseman to make the test.

(*c*) The bailee must redeliver the article with its increase or profits. He cannot deny his bailor's title, that is, he cannot hold the article under a claim that it is his or another person's, but must return it and resort to an action to establish his claim.

Examples: 5. C borrows D's bonds to pledge in order to raise money. C must return the bonds and also any income accruing during the loan.

6. C borrows D's team and refuses to return it, alleging that it belongs to his wife, a sister of D. This is not a good defense. C must return the team, and the wife can then bring an action to recover it. C cannot thus dispute his bailor's title.

4. *Termination of bailment.* A bailment in the nature of a loan may be terminated at the will of the borrower. Whether, if it be for a definite time, the lender may recall it before the time has elapsed is a doubtful question. Any violation of the borrower's duty toward the article justifies the lender in recalling it. The death of the borrower, or his insanity, terminates the bailment. The death or insanity of the lender may not, possibly, terminate a loan for a definite period if that period has not yet elapsed.

II. Mutual Benefit Bailments

65. Pledge or pawn. This is a mutual benefit bailment intended as a species of security, and when it is a bank transaction with stocks, bonds, or other like instruments pledged, it is called collateral security.

1. *How created.* A pledge or pawn is a bailment of a chattel as security for a debt or other legal obligation, and is usually accompanied by a power in the bailee to sell the article in case of default. When a transaction is on a larger scale the bailment is often called the giving of collateral security, as where one borrows money at a bank and deposits bonds as security for the loan. These transactions by way of pledge can arise only by contract. The statutes generally regulate somewhat strictly the business of pawnbrokers, and prescribe the rate of interest they may lawfully charge for loans secured by pledge. Delivery to the pledgee is essential to the creation of a pledge. The delivery of documents of title, like warehouse receipts or bills of lading, constitutes a pledge of the property they represent. Stock certificates should be accompanied by a power to transfer the title upon the books of the corporation that issued them.

2. *Rights and obligations of pledgor.* A pledgor of property impliedly warrants that he has good title to it, and is liable to the pledgee for a breach of this warranty if the pledgee is damaged thereby. He has a right to assign to another his interest in the pledged article, that is, the difference between its value and the sum for which it is pledged. He has a right to redeem the pledge by payment of the debt which it secures. No agreement of the parties can make the pledge irredeemable, because this is regarded by the law as oppressive to the debtor, who usually gives a pledge under the stress of necessity.

3. *Rights and duties of pledgee.* The pledgee has a right to assign his interest in the pledge. He has no right to use the pledged article except so far as its use is necessary to its proper care. Any profits derived from it the pledgee holds to apply toward the debt, but if that is otherwise paid, he must account

for them to the pledgor. He is to be reimbursed for any expenses necessarily incurred in caring for the article pledged. He must use ordinary care in keeping and preserving the property and is liable for ordinary negligence. This case lies midway in this respect between the bailment for the bailor's sole benefit and that for the bailee's sole benefit. He must redeliver the property when the pledge is redeemed by the pledgor.

After the debt is due and unpaid, the pledgee may sell the property to pay the debt, and must pay to the pledgor any surplus above the debt, interest, and expenses of sale. If there is no provision in the contract permitting a private sale, the sale must be at public auction after due notice to the pledgor; but it is often held that stocks and bonds may, after due notice, be sold on the floor of the stock exchange. The pledgee cannot purchase at his own sale. In the absence of an express provision in the contract prescribing the mode of sale, and especially where notice cannot be given to the pledgor, or where there are conflicting claims, it is safer for the pledgee to secure a judicial sale under a decree of a court of equity. In some states the statute provides for the manner of sale of pledged property.

4. *Termination of pledge.* A pledge is terminated when the property is redelivered to the pledgor, or when by tender or payment of the debt the pledgor is entitled to have it redelivered. A refusal to redeliver the property when the pledgor is entitled to it renders the pledgee liable in tort for conversion.

Examples: 1. A pledges a jewel to B as security for a loan. B leaves the jewel at night in a show case. Burglars enter and take it. B is liable to A for the loss if it is found that B did not use due or ordinary care for the safe keeping of the jewel. Due care might require B to put the jewel in a safe.

2. B wears the jewel and it is lost. B is liable to A, for he assumed the risk in wearing the jewel.

3. A pledged securities to a bank for the payment of a particular loan. A paid the loan and demanded the securities. The bank refused to deliver them and claimed to hold them for another unsecured loan. A brought an action against the bank for conversion of the securities and recovered. The bank could hold the securities for the particular loan but for no other.

4. The bank received dividends on the securities. These belong to A after he pays the loan, or they may be deducted from the loan and payment made of the balance.

5. A received dividends on the securities. He holds them in trust for the bank until the loan is paid.

6. A pledgee upon default sold the pledge under authority given by the pledgor, and purchased at his own sale. The sale may be avoided at the election of the pledgor.

Pawnbrokers. In New York pawnbrokers may take 3 per cent a month for the first six months and 2 per cent a month thereafter upon loans not exceeding $100, and 2 per cent a month for the first six months and 1 per cent a month thereafter upon loans exceeding $100. They cannot sell pawns until one year after possession thereof, and the sale must be at public auction and conducted by a licensed auctioneer. Notice of the sale must be published for at least six days in two daily newspapers. Any surplus on the sale shall be turned over to the pledgor. In Massachusetts the mayor and aldermen or other licensing board of a city may fix the rate of interest, and articles may be sold at public auction after four months.

66. Bailee hires an article of bailor. This is also a mutual benefit bailment, since both parties derive a benefit from it.

1. *How created.* This bailment arises only by contract. The bailor agrees to deliver to the bailee an article to be used by the latter, who, in turn, agrees to pay the bailor a compensation for such use. If the bailor refuses to deliver or the bailee to receive, there is a breach of contract for which damages may be recovered. When a delivery is actually made and accepted, the bailment begins.

2. *Rights and liabilities of bailor.* The bailor warrants his title and warrants that the bailee shall not be disturbed in his possession by one maintaining a superior title. He must warn the bailee of any defects, known to him and not observable by the bailee, which render the article dangerous for the purpose for which it is hired. So also the bailor must use due care to discover and remedy defects.

Example 1. B lets to C a horse and carriage and the carriage breaks down and injures C from a defect which by the use of due care B might have discovered. B is liable to C.

3. *Rights and duties of bailee.* The rights and duties of the bailee may be fixed in part by the contract. In the absence of contract provisions the following general rules would govern.

(*a*) The bailee must exercise ordinary care in the keeping and use of the article and is liable for ordinary negligence. Ordinary care is that which the average prudent man exercises under like circumstances in the conduct of his own affairs. The bailee is not liable for inevitable accident nor for any willful act of a third person. He is liable only for negligence, that is, the want of that ordinary care on his part which naturally and probably results in injuring the article.

(*b*) The bailee acquires the right to the exclusive use of the article during the time specified. He may maintain an action for any disturbance of his lawful possession and is said to have a special property in the goods. He must use the article with due care and only for the purpose or in the manner agreed upon. If he hires a horse to drive to A, he must not drive elsewhere or beyond A. An intentional material variation from the terms of the contract may amount to a conversion and render the bailee absolutely liable for the safe return of the chattel.

Examples: 2. A hires B's horse to drive to X. He does drive to X, but by a very circuitous and unusual route. This may be a technical conversion and render A liable for any injury to the horse while so converted.

3. A overdrives the horse and injures it. He is liable to B for want of care in using the horse.

(*c*) The bailee is liable to third persons for injuries resulting to them from his use of the article, in the same way as if it were his own. The bailor is not liable unless, perhaps, for some inherent vice in the article of which he did not warn the bailee. Third persons injuring the article are liable to either the bailor or the bailee as their damage may appear.

Examples: 4. A hires B's horse. A drives so negligently that he injures C. A is liable to C. B is not liable to C.

5. X drives into the horse and injures it. X is liable to A to the extent that the injury renders the horse less valuable to A, and to B for any permanent injury to the horse.

(*d*) The bailee is bound to compensate the bailor. If the price is not fixed by agreement, a reasonable price is understood. If the chattel is destroyed without fault of either party

before the term of the bailment is completed, the contract is discharged, but the bailor may recover the reasonable value of such use as the bailee has had up to that time.

(*e*) The bailee must redeliver the chattel at the termination of the bailment, and must pay any damages done to it by his negligence. If the bailee converts the chattel and the bailor recovers its full value, the absolute title vests in the bailee upon such payment to the bailor.

Example 6. A hires B's wagon for two days. At the end of two days B demands it and A refuses to return it. (*a*) B may replevin it, that is, get it by legal process. (*b*) B may sue in tort for conversion and get a judgment for the full value of the wagon. When A pays this judgment (not before) the title to the wagon vests in A.

67. Bailor engages bailee to keep, repair, or transport an article. In these bailments there is always a contract under which the bailee is to perform some services upon the chattel for a compensation.

1. *Different bailments under this head.* These bailments are of various kinds and for various purposes. There are three distinct types: (*a*) where the bailee for compensation is to take care of the goods for the bailor, as a warehouseman stores and cares for the goods of his customer or an innkeeper those of his guest; (*b*) where the bailee for compensation is to do some work upon the article, as a jeweler repairs a watch or a miller grinds grain; (*c*) where the bailee is to carry or transport goods for the bailor for a compensation, as railways carry freight or postal authorities carry letters.

The cases of innkeepers and common carriers present peculiar features and will be treated separately.

2. *Liabilities of bailor.* In addition to the liabilities of bailors in other relations, the bailor in this class is under a duty to compensate the bailee. That the bailee receives a compensation is the distinctive characteristic of these bailments. The compensation may be slight, but if there is any it serves to take the case out of the class of gratuitous bailments. Thus if B agrees to take and care for C's horse upon consideration that

he may use it, B is a bailee for hire and is not a mere depositary; he receives the use of the horse as compensation.

Usually the compensation is fixed by the contract or it is understood that it shall be the reasonable value of the bailee's services. When the bailee has fully performed he is entitled to his compensation, even though before the article is returned to the bailor it should be destroyed, provided the destruction is due to no fault of the bailee. If the article is destroyed without his fault after he has partly performed but before his contract is completed, he is entitled to compensation for labor or material furnished up to the time of the destruction of the article. If the bailee abandons the work without justification, many courts forbid him to recover any compensation, but some permit a recovery for the services less the damages to the bailor arising from the breach. So if the bailee does the work unskillfully, but it is of some value, he may recover its value less the damages to the bailor.

Examples: 1. B runs a store. He permits packages to be left there to be taken by a local expressman. A package for C is left there to be taken by the expressman, and when called for cannot be found. C sues B, who contends he was a gratuitous bailee and liable only for gross negligence. The judge tells the jury that B is not a bailee for hire unless he is to receive some certain benefit, — that an uncertain, contingent benefit in drawing custom to his store is not enough. On appeal the court held this was error. The nature and amount of compensation are immaterial. The law will not inquire whether it is adequate, nor in such a case whether it is certain. It is enough that B derives some compensation. (But note that in this case *C* is under no obligation to pay B anything.)

2. C agrees to work as bailee on B's chattel. After beginning the work, but before completing it, he stops and refuses to go on. Can he recover anything? Many courts say he cannot because he has committed a breach. Some allow him to recover the reasonable value of his services, less the damages to the bailor from delay in the completion of the work.

3. *Rights and liabilities of bailee.* These are often regulated, at least in part, by contract. Where the contract is silent the following rules apply.

(*a*) The bailee is bound to exercise ordinary care and diligence and is liable for ordinary negligence; but the standard

of liability is different in the case of innkeepers and common carriers. If the bailee undertakes to perform work requiring skill, as in the case of a watch repairer, he is bound to possess and exercise the skill ordinarily possessed by those engaged in the occupation.

(*b*) The bailee has a temporary, special property in the chattel, and may protect this by insurance and by appropriate action against third persons who interfere with his possession.

(*c*) The bailee has a lien upon the chattel for his reasonable charges for storage or for services. The only bailees in this class who were excepted at common law were agisters who pastured cattle and livery-stable keepers who cared for them, but statutes have generally extended the lien in favor of these bailees. At common law the lien was merely possessory and was accompanied by no power to sell; but the power of sale to enforce the lien is now quite generally conferred by statute.

Warehousemen. A warehouseman is one who receives and stores goods for compensation. The warehouseman usually gives a "warehouse receipt" for goods received by him. These receipts may be transferred by indorsement so as to give the indorsee a right upon presenting the receipt to claim the goods. Grain stored in warehouses is transferred by merely indorsing and transferring the warehouse receipts. Usually such grain is mixed with like grain of other bailors, and the receipt entitles the owner to the specified number of bushels from the common mass. In the absence of contract or custom the bailee has no right to confuse the bailor's goods with those of others, and if he does so and loss ensues, he must make good the loss. If he confuses a bailor's goods with his own, he will suffer whatever loss or inconvenience arises, even to the extent of losing his own goods altogether. If the goods are injured or lost, it is incumbent upon the warehouseman to account for the injury. If he pleads a fire or theft or the like, the bailor must then show that the fire or theft was due to the negligence of the warehouseman. United States bonded warehouses are regulated by statute (U.S. Revised Statutes, §§ 2954–3008). They are for the convenience of importers or others required to pay duties or excise taxes, and goods are kept in them in bond until such taxes are paid.

Wharfingers. Wharfingers are those who maintain wharves for the purpose of receiving goods and keeping them for compensation. They are a special kind of warehousemen.

Safe-deposit companies. If one rents a safe-deposit box in a bank or in the vaults of a safe-deposit company, is the bank or the company a bailee of

the articles stored in the box? Probably not, in the ordinary sense of that term. The company never has possession of the contents of the box. The one who hires the box puts the articles in it, locks it, and keeps the key. The company for added security has another key, without the use of which the box cannot again be opened. Neither key alone will open the box; both must be used. The situation is like bailment but does not fully correspond to it. The company is liable for breach of contract in permitting any unauthorized person to open the box, and is bound to use due diligence to guard the box and its contents. While the courts sometimes speak of these transactions as bailments, there is a material difference between them and ordinary bailments in that there is no actual delivery of the goods to the company.

Banks. When money is deposited in a bank the relation is that of debtor and creditor, not that of bailor and bailee. One may, however, make a deposit as bailor. Such would be the case where one deposits a bag of gold, the same identical money to be returned to him.

III. Special Cases of Bailment for Keeping or Transportation

68. Innkeepers. The relation of an innkeeper to his guests, and particularly toward the goods of his guests, is peculiar, and is the result of a state of society now largely outgrown.

1. *Who are innkeepers.* An innkeeper or hotel keeper is one who holds himself out to the public as ready to entertain travelers or transients as guests for a compensation, furnishing food and lodging, or lodging alone. A restaurant is not an inn, because it furnishes only food. A lodging house is not an inn, because the keeper is not bound to entertain any who apply, and makes a special contract with each. An innkeeper, as to some of his permanent guests, may be rather a lodging-house keeper or a boarding-house keeper than strictly an innkeeper. A steamer providing lodging and food for passengers has been treated as to those so entertained as a floating inn, but there is strong authority to the contrary. A sleeping car, on the other hand, is held not to be an inn. These distinctions are very nice and not always satisfactory.

2. *Who are guests.* A guest at an inn or hotel is a transient who receives accommodations at it under a contract, express or

implied, with the proprietor. One who lives regularly or permanently at a hotel is not a guest in the legal sense of the term. But one may engage accommodations for a definite period, longer or shorter, without ceasing to be a guest, provided he is still a wayfarer or transient and not a resident. The transient may be a traveler or one who resides in the place where the inn is located. The taking of lodgings is not necessary to make the patron a guest. A traveler who resorts to an inn for food or drink may be a guest. He may even become a guest at the railway station and there put his baggage in charge of the hotel porter.

Examples: 1. B's family reside in X, but B lives in Y and visits X only occasionally. The family engage permanent accommodations at a hotel. B visits them there and remains at the hotel for a month. B's watch and his wife's jewels are stolen. B is a guest and the innkeeper is liable to him for the loss of the watch. His wife is not a guest and cannot recover for her jewelry.

2. B goes to a hotel and registers, but does not take a room. He goes to the dining room, leaving his hand bag in the custody of a porter. It is stolen. The innkeeper is liable. The taking of a room, however, is a quite decisive test.

3. *Rights and liabilities of an innkeeper.* These differ in several particulars from those of other bailees.

(*a*) An innkeeper is bound to receive all fit and orderly guests if he has accommodations for them. His refusal to do so may render him liable to an action for damages, or to a criminal prosecution, or both. Ordinary bailees may choose with whom they will deal, but an innkeeper is following a public calling and must serve all members of the public alike. The innkeeper must receive the baggage of the traveler also.

(*b*) At common law an innkeeper is absolutely liable for the loss of his guest's goods in the inn, unless such loss was due to an act of God, to an act of the public enemy, or to the fault of the guest. He is thus practically an insurer of the safety of the goods, — and especially against theft, — a liability which does not attach to bailees generally. This rule originated in early times when robbers infested the routes of travel, and was intended to protect the guest from collusion between

them and the innkeepers. Modern statutes have to some extent relieved the innkeeper from this high degree of liability by providing that if he posts notices that he has a safe in which valuables may be deposited he shall not be liable for those retained by the guest. Whether "valuables" includes reasonable pocket money or a watch has been differently decided, but in New York it is held that these are included, and that if a guest retains them he does so at his own risk.

While the common law rule of liability stated above is the one quite generally adopted, it has not gone without dispute. Indeed three different rules have been applied: (1) the strict rule given above, that the innkeeper is an insurer, with the exceptions noted: (2) that the innkeeper may excuse himself by showing inevitable accident or irresistible force, though not amounting to an act of God or the public enemy, as fire or robbery; (3) that the innkeeper may excuse himself by showing that he was free from negligence. Many statutes have expressly relieved the innkeeper of liability for loss not due to his negligence. (For the meaning of "act of God" see sec. 69, p. 115, *post*.)

The innkeeper is also bound to use due care to protect guests from assaults or insults, and especially those proceeding from the servants of the inn.

(*c*) The innkeeper has a lien upon the baggage of his guest for the amount of the guest's bill. At common law he had no power to sell the goods in order to enforce the lien, but such power is now generally conferred by statute.

4. *Innkeeper as ordinary bailee.* An innkeeper is an ordinary bailee of goods brought to the inn by a guest for show or sale, of the goods of boarders, and of goods held by him under a lien. He may be a gratuitous bailee of goods left by one not a guest or left for an unreasonable time by one who has ceased to be a guest.

69. Common carriers of goods. No other bailee for mutual benefit undertakes so high a degree of liability as a common carrier of goods, although by special contract the carrier now usually avoids the extreme liability fixed by the common law.

1. *Who are common carriers.* A common carrier is one who, in the exercise of a public calling, undertakes to transport for a compensation the property of any person who may apply. A private carrier is one who so transports goods under special

contract without being engaged in the business as a public employment. A common carrier holds himself out as ready to serve all persons indifferently to the extent of his ability. In this respect he is like the innkeeper. Railways, steamboats, canal boats, express companies, stages, and the like, so far as they carry goods, are common carriers.

2. *Liabilities.* Two things distinguish the liabilities of common carriers from those of private carriers and most other bailees: first, they are liable for wrongfully refusing to receive and transport goods; second, they are insurers of goods against all loss or damage, except such as may be occasioned by the act of God, or of the public enemy, or of public authority, or of the shipper himself.

First. The duty to carry for all indifferently arises from the public or quasi-public nature of the calling. A refusal to carry up to the limit of his facilities may render a common carrier liable in damages, or he may be compelled by the courts to perform the duty specifically. Dangerous goods, or goods other than those which the carrier professes to carry, may be lawfully refused. Carriers, like railways, which enjoy special franchises, as rights of way or the power to condemn lands for a right of way, may be compelled to supply reasonably sufficient facilities, but carriers not enjoying such special privileges cannot be compelled to supply greater facilities than they choose. The duty to carry for all indifferently implies the duty not to discriminate between customers by giving any preference to the goods of one over those of another, or by charging one shipper more than a reasonable rate while carrying for another at a reasonable rate. A carrier might, however, unless prevented by statute, carry for one at less than a reasonable rate, provided he carried for others at a reasonable rate. There exist in most states statutes governing the rates to be charged by common carriers for transportation beginning and ending within a state; and the federal Congress has enacted a similar statute, known as the Interstate Commerce Act, providing a method for regulating the rates to be charged for transportation from one state to another.

Second. The liability for loss or damage is very great. In the absence of contract to the contrary, or of statutory modification, a common carrier is liable absolutely for all loss or damage to the goods in his hands as common carrier, except as follows:

(*a*) The carrier is not liable for loss occasioned by an act of God, that is, by some force of nature beyond the control of man and unconnected with any human agency. Lightning, extraordinary floods, cyclones, and the like are regarded as acts of God. Fire unless occasioned by lightning is not. Accident is not, unless it be what is termed inevitable accident. Even if the loss is due to an act of God, the carrier may be liable if the loss is related proximately to some negligence of his.

Examples: 1. The carrier negligently delays goods at X, where there is known to be danger of a flood. Even if the goods are destroyed by an extraordinary flood, the negligence in delaying them there may render the carrier liable.

2. A steam boiler explodes without any known cause and injures a shipper's goods. The carrier is liable.

3. Lightning sets fire to a freight car and destroys its contents. The carrier is not liable.

4. A fire breaks out from causes unknown and destroys freight. The carrier is liable.

(*b*) The carrier is not liable for loss or damage occasioned by the public enemy, that is, by an organized military force making war upon the country of the carrier, or by pirates on the high seas. Mobs, rioters, strikers, and the like are not regarded as public enemies within this exception. The carrier is liable for loss by theft. If he negligently exposes the goods to the risk of destruction by the public enemy, when he could take a safer route, he will be liable for the loss.

(*c*) The carrier is not liable for losses due to the fault of the shipper.

Examples: 1. The shipper improperly packs breakable goods, as china, and they are injured in transit. The carrier is not liable.

2. The shipper conceals money in a box of ordinary freight and it is lost. The carrier is not liable for the loss of the money, because he is entitled to be advised of the value of the goods in order that he may take necessary precautions.

(*d*) The carrier is not liable for any loss or damage due to the intervention of some lawful public authority, as where goods are taken from him by health officers or by seizure under legal process.

(*e*) The carrier is not liable for loss or damage due to the inherent nature or infirmity of the goods.

Example. The carrier is not liable for the decay of fruit unless he has negligently delayed it in transit. He is not liable for the death of stock due to disease or fright, unless such death can be proximately traced to some negligence of his.

In any case the carrier is liable for his own negligence to the same extent as any bailee for hire. He is liable for deviations or delays resulting in loss if due to his negligence.

3. *Modifications of liability by contract or statute.* A common carrier may, unless forbidden by statute to do so, contract with the shipper to limit his liability to that of an ordinary bailee; that is, he may contract against liability as an insurer. The rule that he should insure the safety of the goods was intended to protect the shipper against collusion between the carrier and highwaymen or other robbers. The reason for the rule has practically disappeared, and therefore the courts uphold contracts which abrogate the rule so far as they are reasonable or not contrary to public policy.

Carriers have also sought to contract against their own negligence or that of their employees, that is, against the liability fixed for an ordinary bailee. This most courts have refused to permit them to do, upon the ground that it is contrary to public policy. England and New York permit it, although even there the shipper is entitled, upon the payment of a higher rate, to have his goods carried without such a limited-liability contract.

In some jurisdictions statutes modify the common law liability of carriers in some particulars, for example by exempting the carrier from loss or damage by fire not due to the negligence of the carrier.

Contracts sometimes limit the amount of liability to a sum fixed by the shipper as the value of his goods. These are generally upheld on the ground that if the value is greater than that fixed the carrier is entitled to greater compensation for the added risk.

Contracts also often require claims for loss or damage to be presented within a stated time, and if the time allowed is reasonable these are also upheld.

The consideration of these contracts is usually that the carrier will transport the goods at a lower rate than that charged where his liability is that fixed by the common law. (For the contract usually made see the uniform bill of lading conditions, *post.*)

A mere notice not brought to the attention of the shipper cannot operate to limit the carrier's liability. But a notice in a bill of lading, express receipt, and the like is presumed to be assented to by the shipper who receives it if it is delivered to him before the goods are beyond recall. This rule does not apply to a local baggage carrier who gives a receipt for baggage, because custom has not made such receipts evidence of a contract. Nor does the rule apply to the ordinary railway ticket. In such cases it must be shown that the person receiving the token or ticket actually saw or knew of the notice when he took the receipt or purchased the ticket.

4. *When liability ends.* Liability as carrier ends when the goods are delivered to the consignee, or when after notice the consignee leaves the goods an unreasonable time in the hands of the carrier. In the latter case the carrier ceases to be liable as carrier and becomes liable as warehouseman. In many states a railway carrier becomes merely a warehouseman, without notice to the consignee, when the goods arrive at their destination and are unloaded into the railway freight house.

Liability also ends when a carrier, having received goods to be transported over its own and connecting lines, has delivered the goods to a connecting carrier, unless the first carrier has contracted to transport the goods to their final destination.

By merely accepting goods billed to a point beyond its own line, a carrier does not contract to be liable after the goods leave its hands; there must be something in the contract to that effect. This is the general American doctrine; but in England and a few of our states it is held that a railway accepting goods billed beyond its line impliedly undertakes to deliver them at their final destination and is therefore liable for loss occurring upon a connecting line. If the first carrier takes prepayment for the whole transit, or in the bill of lading agrees "to forward," or uses like expressions indicative of an agreement to deliver at the final destination, a contract for the whole transportation may be implied. If the first carrier is not made liable by its contract, the shipper must recover against the carrier that causes the loss or damage. But goods found damaged in the hands of a railway company are presumed to have been damaged by that company.

5. *Delivery.* The carrier must deliver the goods to the consignee or a connecting carrier or pay damages for nondelivery, unless (*a*) they are claimed by one whose title is superior, as by a true owner whose goods have been converted, or (*b*) the consignor has exercised the right of stoppage *in transitu* (see p. 88 *ante*), or (*c*) they have been lost from a cause for which the carrier is not liable. If the carrier delivers to the wrong person he is liable for conversion. The carrier must use due diligence to notify the consignee of the arrival of the goods.

6. *Bills of lading, etc.* A bill of lading is the written receipt by a carrier for goods delivered to the carrier for transportation, and an agreement to transport and deliver them to a person named therein or to his order. It is signed by an agent of the owner of the vessel, railroad, or other transportation agency.

A charter party is a contract of affreightment in writing, by which the owner of a vessel lets the whole or a part of her to a person for the transportation of goods for a particular voyage, in consideration of the payment of freight charges. A charter party may leave the possession and control of the vessel with the owner, or may transfer the possession and control to the freighter.

With the growth of commerce and the increase of carriers it has been found advantageous to have a uniform bill of lading. Railway companies therefore united in adopting one which is now generally in use. Shippers when once familiar with it need not scrutinize each one in order to ascertain whether it contains some new term. Like the standard fire-insurance policy it brings uniformity into an everyday transaction and contract; but, unlike that, it is the result of voluntary agreement and not of statutory enactment.

A shipping order is also used as a part of the uniform bill of lading forms. This is an order signed by the shipper and addressed to the carrier, directing him to receive and carry the goods. It contains the same conditions as the bill of lading.

There are also in use a uniform export bill of lading and a uniform live stock bill of lading.

Lackawanna Railroad

BILL OF LADING. (FORM 20-B.) 10-04

The Delaware, Lackawanna & Western Railroad Co.

RECEIVED, subject to the classification in effect on the date of issue of this Bill of Lading,

at Ithaca Station, Jan. 20 1905

from Albert Fisher the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, in consideration of the rate of freight hereinafter named, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (see conditions on back hereof), and which are agreed to by the shipper and accepted for himself and his assigns as just and reasonable.

MARKS:	DESCRIPTION OF ARTICLES.	WEIGHT. Subject to Correction.
X. L. S.	20 Calendar Clocks	600
Consignee Geo. Warner 17 Lake St		
DESTINATION. Place Chicago County State Ill		
Route D. L. W. Mich. Plate		
Charges Advanced, $ Car No.	J. B. Dilevan Agent. (The signature of the Agent here acknowledges only the receipt of the property, and the charges advanced, if any.)	STAMP HERE.

NOT NEGOTIABLE.

If the word "ORDER" is written immediately before or after the name of the party to whose order the property is consigned, the surrender of the Bill of Lading properly indorsed by the consignor is required by the delivery of the property at destination, as provided by Section 9 of the Condition of the Uniform Bill of Lading, on the back hereof.

The blank spaces below must not be filled up by the shipper.

The rate of freight from Ithaca to Chicago is, in cents per 100 pounds:

First Class ——— times First Class . 52c Second Class ——— Third Class ——— Fourth Class ——— Fifth Class ——— Sixth Class ——— Special Class ———

J. B. Dilevan Agent.
(The signature of the Agent here acknowledges only the rate given.)

Received $ ——— to apply in prepayment of the charges on the property described above.

(The signature of the Agent here acknowledges only the amount prepaid.) Agent.

The words "not negotiable" are printed on the face of each uniform bill of lading for the protection of carriers under certain state laws. They are sometimes omitted where they interfere with the obtaining by the shipper of advances upon the bill of lading.

Uniform Bill of Lading Conditions

1. No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto, by causes beyond its control; or by floods or by fire; or by quarantine; or by riots, strikes, or stoppage of labor; or by leakage, breakage, chafing, loss in weight, changes in weather, heat, frost, wet, or decay; or from any cause if it be necessary or is usual to carry such property upon open cars.

2. No carrier is bound to carry said property by any particular train or vessel, or in time for any particular market, or otherwise than with as reasonable dispatch as its general

business will permit. Every carrier shall have the right, in case of necessity, to forward said property by any railroad or route between the point of shipment and the point to which the rate is given.

3. No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee. The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation. Claims for loss or damage must be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than thirty days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event. [Any carrier or party liable on account of loss or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property.][1]

4. All property shall be subject to necessary cooperage and bailing at owner's cost. Each carrier over whose route cotton is to be carried hereunder, shall have the privilege, at its own cost, of compressing the same for greater convenience in handling and forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is an elevator may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of same kind, without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder. No carrier shall be liable for differences in weights or for shrinkage of any grain or seed carried in bulk.

5. Property not removed by the person or party entitled to receive it within twenty-four hours after its arrival at destination may be kept in the car, depot, or place of delivery of the carrier, at the sole risk of the owner of said property; or may be, at the option of the carrier, removed and otherwise stored at the owner's risk and cost and there held subject to lien for all freight and other charges. The delivering carrier may make a reasonable charge per day for the detention of any vessel or car and for use of track after the car has been held forty-eight hours for loading or unloading, and may add such charge to all other charges hereunder, and hold said property subject to a lien therefor. Property destined to or taken from a station at which there is no regularly appointed agent shall be entirely at risk of owner when

[1] The portion in brackets may be omitted by any carrier.

unloaded from cars, or until loaded into cars; and when received from or delivered on private or other sidings, shall be at owner's risk until the cars are attached to, and after they are detached from, trains.

6. No carrier hereunder will carry, or be liable in any way for, any documents, specie, or for any article of extraordinary value not specifically rated in the published classifications, unless a special agreement to do so, and a stipulated value of the articles, are indorsed hereon.

7. Every party, whether principal or agent, shipping inflammable, explosive, or dangerous goods without previous full written disclosure to the carrier of their nature shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

8. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading shall be void.

9. If the word "Order" is written hereon immediately before or after the name of the party to whose order the property is consigned, without any condition or limitation other than the name of a party to be notified of the arrival of the property, the surrender of this bill of lading properly indorsed shall be required before the delivery of the property at destination.[1] If any other than the aforesaid form of consignment is used herein, the said property may, at the option of the carrier, be delivered without requiring the production or surrender of this bill of lading.

10. Owner or consignee shall pay freight at the rate herein stated, and all other charges accruing on said property, before delivery, and according to weights as ascertained by any carrier hereunder; and if upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped, and at the rates and under the rules provided for by published classifications.

11. If all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the conditions, whether printed or written, contained in this bill of lading, including the condition that no carrier or party shall be liable for any loss or damage resulting from the perils of the lakes, sea, or other waters; or from explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances; or from collision, stranding, or other accidents of navigation; or from the prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have liberty to call at intermediate ports; to tow and be towed, and to assist vessels in distress, and to deviate for the purpose of saving life or property. [And any carrier by water, liable on account of loss of or damage to any

[1] This is often printed on the face of the bill, as it is an important stipulation.

of said property, shall have the full benefit of any insurance that may have been effected upon or on account of said property.][1]

Note. Unless otherwise provided in the classification, property will be carried at the tariff rates, if shipped subject to the conditions of the Uniform Bill of Lading.

If the shipper elects not to accept the said tariff rates and conditions, he should so notify the agent of the receiving carrier at the time his property is offered for shipment; and if he does not give such notice, it will be understood that he desires his property carried subject to the Uniform Bill of Lading conditions in order to secure the reduced class rates thereon. Property carried not subject to the conditions of the Uniform Bill of Lading will be at the carrier's liability, limited only as provided by common law and the laws of the United States and of the several states, in so far as they apply. Property thus carried will be charged twenty per cent higher (subject to a minimum increase of one cent per hundred pounds) than if shipped subject to the conditions of the Uniform Bill of Lading, and the cost of marine insurance will be added over any part of the route that may be by water.

IV. Cases not strictly of Bailment

70. Public carriers of passengers and baggage. Public carriers of passengers are those who in the exercise of a public calling hold themselves out as ready to carry all passengers who apply. They are not, of course, bailees of the persons whom they carry, although they are bailees of a passenger's baggage delivered into their custody. Proprietors of railways, street railways, stagecoaches, steamers, ferries, omnibuses, and the like are public carriers.

1. *Passengers.* Passengers are those persons carried by a public carrier with his consent, except persons in his service. Persons carried gratuitously as well as persons who pay their fare are included. It is the duty of a public carrier, up to the limit of reasonable accommodations, to carry all who are orderly and who pay the reasonable charge.

2. *Liability of public carrier of passengers.* A public carrier does not insure the safety of passengers as he does the safety of goods, but he is bound to use the utmost skill, diligence, and caution, so far as human foresight may go, and is liable for

[1] The portion in brackets may be omitted by any carrier.

slight negligence in this regard. He is liable also for any willful injury inflicted by one of his servants, and is bound to use reasonable care to protect the passenger from violence at the hands of other passengers. He may eject a passenger for refusal to pay fare or for disorderly conduct, using only as much force as is necessary for that purpose.

Whether a carrier may limit his liability to a passenger by contract, and especially the liability for the negligence of servants, is a disputed question. He may in England and in New York and some other states, but the United States Supreme Court and the courts of most states regard such contracts as against public policy, although the United States Supreme Court permits a carrier to limit its liability to a passenger carried gratuitously.

3. *Baggage.* A carrier is bound to transport a reasonable amount of baggage for each passenger. Baggage includes such articles of necessity or convenience as a passenger may carry for his personal use, but not articles carried as merchandise. For all baggage that is delivered into the custody of the carrier he is liable as insurer, unless the liability is limited by lawful contract. In this respect the liability is the same as that of the carrier of goods. There are therefore usually but three questions that arise in the case of the loss of baggage: (1) were the articles lost really the baggage of the passenger? (2) was the baggage actually delivered into the custody of the carrier, or did the passenger retain custody of it? (3) was there any lawful contract limiting the liability of the carrier?

Examples: 1. A traveler going to the woods for recreation carried in his trunk guns and fishing tackle and tennis rackets. The trunk was lost by the carrier. Under the circumstances these articles were held to be properly baggage.

2. A commercial traveler carried in a trunk samples of the goods he was selling. These were held not to be baggage.

3. A traveler carried in his trunk presents for friends. These were held not to be baggage.

4. A traveler carried a hand bag into the car and left it in his seat while he went to the smoking car, and it was stolen. The baggage was not in the custody of the carrier, and the latter was not liable for the loss.

71. Telegraph and telephone companies. These are not common carriers. A few jurisdictions have held them to be common carriers, but the greater number treat them as companies rendering a public service and bound to serve all persons alike and for uniform reasonable compensation. They do not insure the safety and accuracy of messages, but are bound to use reasonable care and are liable for ordinary negligence. They may become insurers by contract for added compensation.

Whether they may by contract stipulate against their own negligence is a disputed question. It is generally held that they may, but some courts regard such contracts as against public policy. Where such contracts are upheld, the telegraph companies refuse to become liable for errors in transmission unless the sender has the message repeated and pays an added compensation therefor.

Either the sender or the addressee of the message may sue in tort for damages arising from the negligence of the company, but only the sender can sue for breach of contract, because he alone has made a contract, unless, indeed, the sender was actually the agent of the addressee and made the contract in his behalf.

It is generally made a penal offense for telegraph companies or any of their employees to divulge the contents of telegrams to any one except the addressee.

REVIEW QUESTIONS AND PROBLEMS

Section **61.** Define bailment; bailor; bailee. Is a finder of lost property a bailee? How is his duty fixed? What is the consideration for a bailee's promise? Can one who does not own property bail it to another? Distinguish bailment from sale; from barter; from a *mutuum*. May a bailee mix the goods with other like goods?

62. State the two classes of bailments. State the subclasses of each. What is a deposit? What is a mandate? What is a *commodatum?* What is a pawn? What is a hiring? State three general and two special cases of hired services about a thing. State two cases not strictly bailment but treated thereunder.

63. How is a bailment for bailor's sole benefit created? Is it a contract? Must the bailor know of it? Must the bailee consent to it? What are the bailor's obligations? What are the bailee's duties? How much care must he use? Can he use the article? Is he liable if the article is lost? When is this bailment terminated?

Problem 1. A bank undertook gratuitously to keep in its vaults a locked chest of C's containing $50,000 in gold. The bank cashier stole it together with money belonging to the bank and absconded. Is the bank liable to C?

Problem 2. In the above case the directors learned that the cashier was engaged in heavy stock speculations, but took no steps to investigate his conduct. Result?

64. How is a bailment for the bailee's sole benefit created? Is a promise to lend enforceable, and why? What is the bailor's duty? What are the duties of the bailee? How much care must he use? May he lend the article to others? May he use it for a purpose not agreed upon? May the bailee deliver the article to a claimant other than the bailor? How is this bailment terminated?

65. Define a pledge. How is it created? What is essential? What warranty does the pledgor make? Can he sell the pledged article? Can the pledge be made irredeemable? What are the duties of the pledgee? What care must he use? What are the pledgee's rights? How may he sell the pledge? Can he purchase? When is the pledge terminated? What claim does the pledge secure? Who are pawnbrokers? May they charge more than the usual rate of interest?

Problem 3. B owed a bank $5000. He then borrowed of the bank $10,000 and pledged 300 shares of stock as security for the loan. B then became insolvent and all his property was transferred to a trustee for the benefit of his creditors. The bank sold the stock for $13,500, paid the loan of $10,000, and applied the surplus $3500 on the prior indebtedness. The trustee sues the bank for this $3500. Which is entitled to it?

66. How is a bailment by hiring a thing created? Is a promise by the bailor to hire it to the bailee enforceable? What does the bailor warrant? What is his duty as to defects? What are the rights of the bailee? What are his duties? How much care must he use? If a third person injures the article, is the bailee liable? Is he liable to third persons, and when? Are they liable to him? Are they liable to the bailor? Who is liable in case the article is accidentally destroyed? If the bailee uses the article otherwise than he agreed, what is the result?

Problem 4. C hires a horse and carriage of X. B negligently runs into and injures the carriage to the extent of $20. C sues B for this damage. May he recover?

Problem 5. As above. The horse falls sick while C is on a journey. C leaves him with D for care and treatment. D sues X for the expense. Result?

67. What classes of bailments of the hiring of services about a thing? What are the duties of the bailor? How is compensation fixed? May the bailee recover if he abandons the work midway? May he recover if after he has finished the work the article is destroyed? What are the duties of the bailee? How much care must he exercise? What is the bailee's lien? Who is a warehouseman? May he mix goods? Who are wharfingers? Is a safe deposit a warehouse? Does money deposited in a bank create a bailment?

Problem 6. C deposited his goods in B's warehouse. They were stolen. C sues B. C contends it is for B to show he used due care. B contends it is for C to show that B was negligent. Which is right?

68. Who are innkeepers? Is a steamship an inn? Is a sleeping car? Who are guests? Must an innkeeper receive all guests who apply? What are his liabilities as to a guest's goods? State three holdings on this. What do statutes provide? What is the innkeeper's lien? When is an innkeeper an ordinary bailee?

Problem 7. C drove to an inn and had his horse placed in the stable connected with it. The horse was kicked by the horse of another traveler and its leg broken. C sues the landlord of the inn. The landlord offers to prove he was not negligent. Would such proof release him from liability?

Problem 8. An inn is accidentally burned and a guest's clothes, jewelry, etc., are destroyed. Is the innkeeper liable?

Problem 9. While C was in a sleeping-car berth, and while asleep, he was robbed of his money and watch. Is the sleeping-car company liable to him for this loss?

69. Who are common carriers? What two things distinguish a common carrier from a private carrier? What goods must a common carrier accept? May he give special rates? What statutes govern rates? How can a common carrier escape liability for loss of goods? What is an act of God? Who is a public enemy? When is the shipper at fault? What are inherent infirmities in the goods? May a shipper contract against loss by above causes? May he contract against loss due to his own negligence or that of his servants? When does his liability as common carrier end? What is the liability of a railway when goods reach their destination and are placed in the freight house? When goods go over several railways, which is liable for damage to them? When is a common carrier excused for nondelivery? What is a bill of lading? What is a charter party?

Problem 10. B owned a sloop which he used for his own business. On two occasions he carried goods for C. On the second occasion the sloop was driven ashore (not by an act of God nor by the negligence of B) and the goods were injured. Is B liable to C?

Problem 11. B owns a vessel running regularly between two ports and carrying passengers and freight. C ships goods on the vessel. It is destroyed by fire while at sea. Is B liable to C for the loss of the goods?

Problem 12. In the above case the vessel is captured by a war vessel of another nation with which B's nation is at war, and the goods are confiscated. Is B liable to C?

Problem 13. C shipped plate glass from New York City to Marion, N.C. The glass went over four different railroads. At Marion it was found to be broken. C sues the B. Ry. which delivered the glass at Marion. The bill of lading provided that "No carrier shall be liable for loss or damage not occurring on its own road," and only for loss by negligence. When the B. Ry. received the box there was no sign of breakage, nor was there any when it reached Marion, until the box was opened. The B. Ry. contends that it is not liable unless C shows that the breakage occurred on its road. C contends that the B. Ry. must show it was not negligent. Which is right?

70. Who are public carriers? Who are passengers? What is the liability of a public carrier for safety of passengers, and what for safety of baggage? What is baggage? May the carrier limit liability for its loss?

Problem 14. C, a passenger, brought action against the B. Ry. for loss of baggage. The trunk contained very valuable dress laces worth $10,000. C was a wealthy foreigner traveling in this country, and the laces were a part of her wearing apparel. Is the Ry. liable for these laces?

71. Are telegraph and telephone companies common carriers? What is their liability? May they contract against their negligence? May the addressee of a message sue for negligence? How?

CHAPTER VI

INSURANCE CONTRACTS

72. Nature and kinds of insurance. Insurance is a system for distributing the losses of a few persons among a large class of persons similarly situated. This is accomplished by raising a general fund through small contributions by many persons, each contributor being entitled to indemnity out of the fund in case a loss falls upon him. If 1000 persons having in the aggregate property valued at $5,000,000 pay annually into a common fund 1% upon this valuation, a fund of $50,000 will be raised out of which losses by fire falling upon any of these persons could be paid. If these 1000 persons live in widely separated parts of the country, it is unlikely that many of them will suffer losses by fire in the same year.

Almost every conceivable risk may now be insured. The main heads of insurance are marine insurance, fire insurance, and life insurance, but there are companies which insure against tornadoes, steam-boiler explosions, breakage of plate glass, defects in titles, defaults or embezzlements by agents, injuries to employees, injuries to one's self, and numerous other hazards.

Marine insurance — that is, insurance against the risk of the loss of vessels and cargoes at sea — is probably the oldest form of insurance and has been traced back to the twelfth or thirteenth century. Fire insurance came into prominence after the great London fire of 1666. Life insurance began practically in the eighteenth century.

In marine and fire insurance the properties insured are classified according to the risk, and the premium is higher or lower as the risk is greater or less. In life insurance only those persons who are regarded as good risks are insured, and the premiums are graded according to the age of the insured. Statistics

have been accumulated upon which average results may be predicted and the premiums based.

73. Kinds of policies. The policies, or contracts of insurance, issued by insurance companies are of various kinds, but it is necessary to distinguish the valued and the open policy.

The valued policy is one that fixes the amount to be paid in case of loss. These policies are always used in life insurance, and are very generally used in the insurance of ships, though not of cargoes. In case of the death of the insured or the loss of the ship the sum specified is paid.

The open policy is one in which the amount to be paid in case of loss, not exceeding a certain sum, is left to be fixed after the loss occurs. These policies are generally used in fire insurance.

Life-insurance policies are either the "life policy," payable only at the death of the insured, or the "endowment policy," payable when the insured reaches a certain age, or upon his death at any prior date. There is also a "term policy" for a fixed number of years, payable only if the insured dies within that time.

74. Definitions. Insurance is a contract whereby for a stipulated consideration one party agrees to compensate or indemnify the other for loss on a specified subject by specified perils.

The insurer is the one agreeing to indemnify. He is sometimes called the underwriter. The insured is the one to whom the promise runs. The premium is the agreed consideration. The policy is the written contract. The risk or peril is the event insured against. The insurable interest is the subject, right, or interest to be protected; it is such an interest as will entitle the person possessing it to obtain a lawful contract of insurance (see sec. 76).

Life insurance is a contract to pay a designated or determinable person a certain sum, or an annuity, in the event of the death of the person whose life is insured. Endowment life insurance is a contract to pay a certain sum or annuity to the person whose life is insured if he lives a certain length of time, or to a designated person if he dies before this time. Tontine

insurance (from Tonti, an Italian, who is said to have devised it) is a system whereby surplus funds, often derived from lapsed policies and often from the profits of investments by the insurer, are to be apportioned among those of the insured who continue their insurance for the specified tontine or dividend period. There are various forms of the tontine or dividend system. An endowment policy is a form of investment by the insured as well as an insurance proper.

Accident insurance is a contract to indemnify the insured against personal injury resulting from accident, and usually includes a contract to pay a specified sum to his estate or to a designated person in case of death resulting from accident.

Marine insurance is a contract to indemnify the insured against loss to property (ships and cargo) arising from the perils of the sea during a certain voyage or a certain period of time. It may be issued to cover risks arising on any navigable waters whether sea or inland.

Fire insurance is a contract to indemnify the insured against loss of property or damages to it by fire.

Casualty insurance is a contract to indemnify the insured against damage to property arising from accidents, such as boiler explosions, floods, tornadoes, hail, failure of crops, breakage of plate glass, death of cattle, burglary, etc.

Guaranty and fidelity insurance is a contract to indemnify the insured against loss arising from fraud or dishonesty of agents (fidelity insurance); the negligence of employees resulting in damage to other employees for which the employer is obliged to pay (employers' liability insurance); the injury to passengers for which the carrier is obliged to pay damages (carriers' liability insurance); the insolvency or dishonesty of debtors (credit insurance); the failure of tenants to pay rent or the loss of rents incident to fires or other injury to premises (rent insurance); the defect or failure of title to real property (title insurance); or the interruption to business by strikes among employees (strike insurance).

Reinsurance is a contract whereby the reinsurer agrees to assume the risk, in whole or in part, which was undertaken by

the original insurer. If the reinsurance policy binds the reinsurer to pay the insured, the latter may maintain an action against the reinsurer upon the theory of a promise made to one person for the benefit of another person (see sec. 33 *ante*); but in the absence of such a clause the insured can look to the original insurer alone, and the original insurer will look to the reinsurer for indemnity. It often happens that an insurer takes a very large risk, and thinks it prudent to divide it by reinsuring some portion of it in another company. The reinsurance is a kind of guaranty insurance.

75. Characteristics. There are these main characteristics in the insurance contract.

1. The contract is aleatory, that is, depending upon an uncertain event. It is in the nature of a wagering contract. If one insures property or a life in which he has no insurable interest, the contract is called a wager and is illegal. If he has an insurable interest, the contract is valid, although it is still somewhat in the nature of a wager.

2. The contract is one of indemnity, that is, to make good against loss in the event that loss occurs. In the open policy the amount of the loss is to be ascertained after it occurs. In the valued policy the parties agree in advance upon the value of the subject-matter of the contract; if it is then destroyed, the loss is taken to be that so fixed by the parties. In life-insurance policies the sum is always fixed, subject to a possible increment in a tontine policy.

There is one important difference between an open fire policy and an open marine policy. If, in an open fire policy for $10,000 upon property worth $20,000, property worth $5000 is destroyed, the insured recovers its full value. In an open marine policy he would recover only that proportion of the amount insured ($10,000) which the loss ($5000) bears to the true value of the property insured ($20,000), namely, one fourth, or $2500. In order to be fully protected in a marine risk, the insured must insure to the full value and, of course, pay a larger premium.

Another incident of the indemnity feature is that if the property insured be destroyed by the negligent act of a third person, so that the owner might maintain an action against the wrongdoer for the damage, the insurer upon paying the loss to the insured is subrogated (that is, substituted) to

the rights of the insured in such action. Were it otherwise, the insured would recover his loss twice over. This does not apply, however, to life insurance where the insured is killed by the wrongful or negligent act of another.

If the insured has two fire policies in different companies upon the same property, the companies contribute ratably to indemnify for any loss. If one pays the whole loss, it may secure a ratable contribution from the other.

3. The contract indemnifies even against the carelessness or negligence of the insured. This is highly important, because if the insurer could defend after loss upon the ground that the insured by his negligence contributed to the disaster, the policy would not be nearly so valuable as a security against serious pecuniary losses. It does not indemnify against willful destruction by the insured, except that suicide will not, by the weight of authority, defeat a life-insurance policy unless the insured can be shown to have taken out the policy with the intent to commit suicide. There are also some terms and some warranties in insurance contracts, the breach of which will prevent the insured from recovering; for example, in accident policies that the insured shall not voluntarily expose himself to unnecessary risks, or in fire policies that the insured shall use reasonable care and means to save property after a fire begins.

The case of suicide has caused the courts much perplexity. The federal courts and some state courts refuse to allow the estate of the deceased to recover where the insured committed suicide when sane, regarding it as against public policy. Some states allow a third person named as beneficiary to recover where they do not allow the estate of the deceased to recover. All courts allow a recovery in any case where the insured committed suicide while insane, unless the policy expressly excepts that risk; but the exception of the risk of "death by suicide" covers only suicide while sane: in order to exempt the insurer the policy should read "death by suicide whether sane or insane excepted." One or two states have by statute forbidden insurance companies to insert such a clause.

In case the insured is executed by the law for a capital offense the insurer will not be liable on the policy even though that risk is not expressly excepted.

Many life-insurance policies now contain a clause declaring the policy to be incontestable after a certain period (say two or three years after it is issued). In such case the insurer can contest the policy only for a lack of any insurable interest or for actual fraud in procuring it, or because the loss or death was due to an expressly excepted risk.

4. The insured must have an insurable interest (see sec. 76).

5. The contract requires the highest good faith on the part of the insured (see sec. 77).

6. The contract contains warranties, the breach of which may avoid the policy (see sec. 78).

7. The statutes often prescribe the form of policy which must be issued (see sec. 79). Insurance contracts may be oral. Statutes prescribing a form of policy do not prevent oral contracts, but subject an oral contract to the provisions of the statutory policy. It is usual in large insurance offices to issue to the insured temporarily a "binding slip," which is a brief memorandum of the insurance contract and gives protection pending the delivery of the formal insurance policy.

76. The insured must have an insurable interest. In order that a policy should be valid it is necessary that the one taking it out should have an insurable interest in the property or the life upon which the policy is issued.

1. *Insurable interest in property.* An insurable interest in property is an interest in property, or a liability in respect of property, of such a nature that the loss of the property might cause a pecuniary injury to the one possessing such interest or under such liability.

Example. A pledgee has such an interest in the pledge that its destruction would or might result in a pecuniary loss to him; so also, of course, has the pledgor. Both the mortgagor and the mortgagee of property have an insurable interest. A stockholder has an insurable interest in the property of the corporation. A farmer has an insurable interest in crops to be raised in the future upon his land. A mere expectancy, like that of an heir who expects to inherit his ancestor's property, does not create an insurable interest. If one insures his interest and afterwards sells it, the policy does not pass to the new owner without an assignment with the consent of the insurer.

2. *Insurable interest in a life.* This is very difficult to define. Any reasonable expectation of pecuniary benefit from the continued life of another creates an insurable interest in that life. If one depends upon another for support or education, in whole or in part, he has an insurable interest in that other's life. Thus a wife has an insurable interest in the life of her husband. If one is entitled to the services of another, he has an

insurable interest in that other's life. Thus a husband has an insurable interest in the life of his wife, and a father has an insurable interest in the life of his minor children. If one has a pecuniary claim upon another, he may insure that other's life. Thus a creditor has an insurable interest in the life of his debtor. Mere relationship by blood or marriage does not of itself create an insurable interest. One brother has no insurable interest in the life of another brother merely because of the relationship; he might have if he were dependent upon the brother. One may value his interest in his own life, or in the life of one upon whom he depends, or to whose services by virtue of family relationship he is entitled, at any sum agreed upon. But a creditor cannot insure the life of his debtor for a sum greatly in excess of the debt. It seems not to be necessary that the person whose life is insured by another should consent to the insurance, but this matter is in some doubt. There are grounds of public policy which might require the consent of a person to have insurance taken out upon his life.

The insurable interest in property must continue throughout the term of the policy, or at least exist at the time of the loss. It is enough in life insurance that it exist at the time the policy is taken out. So also in life insurance the policy may be assigned to one who has no insurable interest, if it was taken out in good faith by one who had an insurable interest; and the insured may make his policy payable to any one if he takes it out himself. Where a policy designates the beneficiary, the right under the policy becomes vested in such beneficiary and cannot be disturbed without his consent. Should the beneficiary die, however, before the insured, a new beneficiary may be named.

77. The contract of insurance is one requiring the highest good faith. In ordinary contracts a party is not bound to disclose what he knows about the subject-matter of the contract; it is for the other party to discover whatever he may deem important. So long as there is no misrepresentation the contract is valid and binding, notwithstanding one party knew and did not disclose certain material defects. But insurance contracts stand upon a peculiar basis in this respect.

1. *Concealment.* The insured is bound to disclose to the insurer every material fact known to him which affects the risk. But this rule is qualified in the United States, except as to marine insurance, by requiring that bad faith be shown in order to avoid a policy because of concealment.

Examples: 1. An attempt has been made to burn B's property. B becomes alarmed and effects insurance without disclosing this fact. The policy may be avoided by the insurer upon the ground of B's concealment.

2. B effects insurance upon his house, omitting to state that it is within a few feet of a fireworks manufactory. This concealment as to the risk is fatal to the validity of the policy.

The rule is very strict in marine insurance and extends to innocent nondisclosure due to forgetfulness or inadvertence; but in fire and life insurance it now probably extends in this country only to intentional concealment of some material fact amounting to bad faith. Where the insurer asks a series of questions in an application blank, a truthful answer to these questions is all that is generally required; but even in this case the insured cannot intentionally conceal a highly material fact, as that an attempt has been made to set fire to the property.

2. *Representations.* Representations are statements made by the insured, usually to give information concerning the risk, and inducing the insurer to issue a policy, but which do not become terms in the contract itself. A material false representation, however innocently made, will avoid the policy; there is an implied condition that a policy shall be enforceable only if the representations which induced the insurer to issue it are true. But a representation as to future conduct, that is, a promissory representation, is not a material one, because the insurer should not rely upon it unless he incorporates it into the written contract. So representations as to opinion or belief are not material; no one should rely upon them.

Examples: 3. B insures C's warehouse. C by mistake states that there is already $200,000 of insurance on the building; there was in fact but $30,000. This is material, since with $200,000 of insurance B's ratable portion in case of loss would be less than if there were but $30,000. If the building burns, C can recover nothing from B. It makes no difference that C believed his statement to be true.

4. C orally states to B that if B insures his building he will cease using a certain fireplace in it. The building burns. B seeks to avoid the policy by showing that C continued to use the fireplace. This is a promissory statement and it will not avoid the policy. If B wants the benefit of a promise, he must incorporate it into the written contract.

78. Warranties. Unless there be a waiver of it, or an estoppel to set it up, the breach of a warranty in an insurance contract will avoid the policy.

1. *Warranties explained.* A warranty is a representation or promise which is included in the policy itself, or in a separate paper incorporated into the policy by reference, and which is made an essential part of the contract. Its falsity or nonfulfillment will avoid the policy. A representation is merely an inducement to the making of the contract. A warranty is a part of the contract itself. Representations must be shown to be material, and it is enough that they are substantially complied with. Warranties are material because inserted in the contract, and they must be strictly and literally complied with. They may be either affirmative of an existing fact or promissory. Note that warranty has one meaning in insurance contracts and another in contracts of sale (see secs. 53, 54 *ante*). In the latter it is collateral, while in the former it is a vital term in the main contract. If a warranty in a sale is broken, an action for damages results. But if a warranty in insurance is broken it discharges the contract; no action for damages for its breach results.

Examples: 1. B represents that his vessel has twelve guns and twenty men. She has substantially this number and the policy is good.

2. B warrants that his vessel has twelve guns and twenty men. She has substantially this number, but the policy is avoided because there is a breach of the warranty in not having precisely the armament and force warranted.

3. B represents that ashes are taken out of his factory in iron hods. They are taken out in copper hods. The representation is substantially true and the policy is binding. But if B warrants that the ashes are taken out in iron hods, there is a breach of the warranty and the policy is avoided. (So stringent is this rule that the courts incline to hold statements to be representations when possible, and some states have statutes to relieve against forfeitures for technical breaches of warranty.)

4. B in the printed questions, which are made by reference a part of the policy, states that he is thirty years old. He is in fact thirty-five. The policy is not binding on the insurance company. This is a warranty.

5. B states as a warranty that the building insured is used "for winding and coloring yarn." He afterwards uses the building for another purpose. There is no breach of warranty. He did not warrant that the building would continue to be used for the purpose it was used for when the policy was taken out.

These rules as to warranties are so strict and work so many hardships that statutes in many states provide that warranties shall not avoid an insurance policy unless they are in fact material. This makes warranties more like representations.

In general, courts will, if possible, construe an insurance policy so as to save the just rights of the insured against forfeiture for a merely technical breach that does not in fact injure the insurer.

2. *Waiver and estoppel.* The doctrines of waiver and estoppel are frequently invoked to prevent the insurer from taking advantage of a misrepresentation or breach of warranty by the insured. Waiver is the voluntary relinquishment of a known right. Estoppel is a bar raised by the law to prevent one party from denying that he has relinquished a right when by his conduct he has led the other party reasonably to rely upon the conclusion that he has relinquished it.

Examples: 6. A policy provides that it shall be forfeited if the insured increases the risk. The insured increases the risk by using the property for manufacturing purposes. The insurer with knowledge of the facts tells the insured that the forfeiture is waived; this is binding. Again with knowledge of the facts the insurer accepts the premium; this estops the insurer from denying that he has waived the forfeiture.

7. The policy provides that if the building insured is on leased ground the policy shall be forfeited. Although this is a warranty that the building is not on leased ground, still if the insured informed the insurer when the application was made that the building was on leased ground, the insurer is estopped to set up a forfeiture.[1]

[1] Massachusetts and New Jersey hold that there is no waiver or estoppel in such a case because they refuse to permit a written stipulation to be varied by parol evidence of *prior or contemporaneous* oral communications, though it might be varied by *subsequent* communications. It is the theory that all prior and contemporaneous communications are merged in the written contract. This is, perhaps, the doctrine held by the United States Supreme Court also.

Whether a particular agent has authority to waive a stipulation in the policy is often a question of great nicety. Whether a restriction upon an agent's authority contained in the policy itself will operate as notice to the insured of such restricted authority is a question upon which the decisions are inharmonious. The weight of authority is that the agent who issues the policy may make a contemporaneous waiver, although he might not have authority to make a subsequent one.

79. Statutory or standard policies. In order to avoid the difficult questions and the uncertainties raised by the widely differing forms of fire-insurance policies, many states have passed statutes requiring the insurance companies to issue a uniform standard policy prescribed by the statute itself. The leading form is the New York standard policy. Copies of this may be obtained of any fire-insurance agent, and it should be carefully read by all who carry fire insurance, in order that there may be no inadvertent violation of the terms by the insured. Massachusetts has a standard policy which differs in some important particulars from that of New York.

For example, the New York form provides that the policy shall be void if the building insured becomes vacant or unoccupied and so remains for ten days, while the Massachusetts form allows thirty days. Many clauses found in the New York form are absent from the Massachusetts form. For example, the New York form provides that the policy shall be void "if the interest of the insured be other than unconditional and sole ownership," or "if the building be on ground not owned by the insured in fee simple," or "if personal property be or become encumbered by a chattel mortgage," while the Massachusetts policy is silent as to all of these conditions.

80. Marine insurance. In the insurance of a ship or cargo against risks at sea there are always three implied warranties, namely, that the ship is seaworthy, that there shall be no voluntary deviation from a specified route, and that the adventure shall be for a legal purpose.

General average is a contribution made by the various owners of a ship and cargo toward a loss sustained by one owner whose property has been voluntarily sacrificed for the common safety, as where, in a storm, goods are cast overboard to lighten the

ship. But the one whose goods are thrown over loses his *pro rata* share of the goods also. Throwing property over for such a purpose is called jettison. General average is a rule of the admiralty courts based upon the usages of maritime commerce.

Example. B's property valued at $4800 is cast overboard in order to save the ship and the rest of the cargo. The ship is valued at $50,000; it earns $2000 on the goods saved and loses $200 on the goods jettisoned; the rest of the cargo is C's and is valued at $43,000.

Loss: $4800 + $200 = $5000.

Contributors: $4800 + $200 + $52,000 + $43,000 = $100,000.

Percentage loss for each, 5 %.

B gets $4800 − $240 = $4560, of which the ship pays $2600 − $190 = $2410, and C pays $2150.

This is a rule in admiralty only. If B's building is torn down to stay the spread of fire, he recovers no contribution from property thus saved.

A marine insurer is bound to make good to the owners of property saved the contribution they pay to one whose property was sacrificed. So also the marine insurer is bound to pay in full the one whose goods were sacrificed, and is then subrogated to his rights of contribution against those whose property was saved.

If the policy on a vessel or goods is merely a fire policy and not a marine policy, the rule of general average has no application.

REVIEW QUESTIONS AND PROBLEMS

SECTION **72**. Explain the system and object of insurance. How did it originate? How are premiums fixed?

73. Distinguish between valued and open policies. Distinguish life, endowment, and term policies.

74. Define insurance; insurer; insured; premium; policy; risk; insurable interest. What is life insurance? What is tontine insurance? What is accident insurance? marine insurance? fire insurance? casualty insurance? guaranty or fidelity insurance and its kinds? What is reinsurance? May the party originally insured recover against the reinsurer?

75. Name the characteristics of the insurance contract. Is it a wagering contract? Is it an indemnity contract, and why? How much may be

recovered? How much in an open marine policy? If one has two policies, how is the loss adjusted? What is subrogation? May one recover insurance on his building burned by his own negligence? If the insured commits suicide, may his estate recover on the policy? May an insurance contract be by parol?

76. What is an insurable interest in property? Illustrate. What is an insurable interest in a life? Illustrate. When and for how long must the insurable interest exist?

Problem 1. C owned a patent and leased the exclusive use of it to B. C then insured the property used by B in order to protect the claim for royalties for the use of the patent. B's property burned. The insurance company claims C had no insurable interest in B's property. Result?

Problem 2. C is a stockholder in a corporation. He insures the corporate property, which afterwards burns. Had he an insurable interest?

Problem 3. An uncle insured his nephew's life. Upon the nephew's death the insurance company resisted payment of the policy upon the ground that the uncle had no insurable interest in the nephew's life. Result?

77. In what important respect do insurance contracts differ from ordinary contracts? What is the duty of the insured as to disclosures? How has the rule been modified? What are representations? What are promissory representations? Effect of innocent representations?

Problem 4. C's building is threatened from a neighboring fire. He at once secures insurance on it, concealing the danger. Is the policy binding on the insurance company?

Problem 5. C secured insurance on the life of X. No information concerning X's habits was asked or given, but other questions were asked and truthfully answered. X was to C's knowledge very intemperate. Is the policy binding on the insurance company?

Problem 6. C secures insurance on a vacant building and states orally that it will be occupied. It is not occupied, and it burns. Is the insurance company liable?

78. What is a warranty? How does it differ from warranty in a contract of sale? How must it be fulfilled? Distinguish it from representation. What is a waiver? What is an estoppel? What is the effect of a breach of representation or of warranty?

Problem 7. C in the written application for insurance on his building (which becomes a part of the policy) states that "there is a watchman nights." The fire occurred on Sunday morning before daylight when there was no watchman. C tries to show a custom not to keep watchmen after twelve o'clock Saturday night. Should he be permitted to do so? Is the warranty broken?

Problem 8. C represents his building as "occupied as a dwelling house." (*a*) It is in fact vacant. Is the insurance valid? (*b*) It is occupied when insured, but afterwards becomes vacant. Two days later it burns. May C recover the insurance?

79. What is the standard policy? Must it be used? How are its terms fixed?

80. What three implied warranties in marine insurance? What is general average? What is jettison?

Problem 9. (*a*) B's cargo is worth $29,000; the freight to be paid on it is $1000. B's goods are thrown overboard to save a ship in a storm. The ship and the rest of the cargo are saved. The ship is worth $50,000 and earns on the voyage $2000 net freight (not including that on B's goods). C's goods are worth $33,000 and D's are worth $35,000. Figure the general average and how much B will receive and how much he will lose; how much the ship will receive and how much it will lose. (*b*) In case B's goods are fully insured and the insurance is paid him, what are the rights of the insurance company?

PART III

PARTICULAR CONTRACTS CONCERNING CREDITS

CHAPTER VII

CREDITS AND LOANS

81. Capital and credit; money and exchange; payment. In the conduct of a business it is necessary to consider the subjects of capital, credit, money, exchange, and the mode and effect of payments.

1. *Capital.* In any business enterprise capital is the total amount, measured in money, that is invested in the business. This capital sum is divided into that which goes to provide a business plant, equipment, stock, etc., and that which remains in available cash after these are installed. The latter is the working capital, for the equipment and stock must be kept intact, or if stock is sold, as in merchandising, it must be replaced in order that the business may go on. The working capital should be sufficient to enable the business to be carried on when collections are slow or when debtors become insolvent. Some of it may be invested in live interest-bearing securities which in case of need can be quickly sold or used as collateral security for temporary loans.

An individual, partnership, or corporation starts a manufacturing business. The plant and equipment cost $100,000. The annual manufactured product amounts to $1,500,000. It costs $600,000 for raw material and $800,000 for labor, repairs, insurance, and other expenses, leaving an annual profit of $100,000. How much working capital should there be over

and above the plant and equipment? This will depend upon the readiness of sales and collections, and other considerations. But if the manufacturer wishes to be able to carry on his business for three months with practically no income, he must have one quarter of his total annual cost of operation, namely, $350,000. There would then be invested $450,000, with an annual profit of about $100,000, or say on the average 20 per cent.

2. *Credit.* Credit consists in the ability to secure some present benefit under an agreement that the return therefor shall be postponed to some future day, — as the ability to borrow money or obtain goods or services to be paid for thereafter. It is the result of the favorable opinion of the mercantile community or of the particular lender or seller as to the solvency, honesty, and business capacity of the borrower or buyer. Commercial agencies publish periodical estimates of the ability of business concerns to meet credit obligations, and these are largely used by those who are requested to extend such credit. The two principal agencies in this country are Bradstreet's and Dun's. Every business man needs credit, and his rating in these publications is of great importance to him. If he gives false information in order to secure credit, he may be liable in deceit to any one injured thereby. If false information is given in the publications, injurious to his credit, he may have an action against the agency for damages. Should the agency through negligence give false information to the subscribers about the credit of a person rated, and if one of the subscribers by extending credit on the strength thereof should suffer a loss, the agency might be liable to the subscriber.

Good credit is of the first importance to a business man. Whether he wishes to borrow money or to purchase goods on deferred payments he must have the reputation of possessing the ability and inclination to meet promptly his pecuniary obligations. Often he must give security which may take the form of a pledge of things of value, like bonds, or of a mortgage on property, or of a guaranty by some third person. If one borrows money at a bank, he may be required to have his note indorsed by one or more persons who are known as accommodation indorsers.

Aside from the credit system above mentioned there is a system of using credit temporarily in place of money for present payments. This is by issuing checks. Including these, the larger part of the business of the country is done on credit, and money is, after all, only an auxiliary to it. Enormous transactions take place without the actual transfer of a dollar in cash. Every day the New York clearing house meets to strike the balance among the banks belonging to it. If bank A presents checks which it has received against banks B, C, D, etc., to the amount of $1,125,382, and if all the banks combined present checks which they have received against bank A to the amount of $1,315,460, then bank A owes the clearing house $190,078. If bank B presents checks against banks A, C, D, etc., to the amount of $1,847,625, and they present checks against it to the amount of $1,620,347, then the clearing house owes bank B $227,278. In this way the balances are struck and the clearing house receives the cash from the debtor banks and pays it out to the creditor banks, being at the close of the transaction not a penny richer or poorer. But while there is an average of about $200,000,000 of checks thus passed through the clearing house daily, only about 5 per cent of cash balances is paid in and paid out. Thus 95 per cent of the business is done by a system of check credits.

Even banks themselves sometimes need credit in order to meet their obligations. Upon depositing with the clearing house its bills receivable or other securities, a bank may obtain clearing-house certificates to 75 per cent of the par value of the securities, and these certificates will be received by the clearing house in payment of balances. In times of panic these clearing-house certificates may enable a bank to avoid a suspension of payments. The certificate simply states that —— Bank has deposited securities, and the certificates, each for $5000, based thereon will be received in payment for balances at the clearing house.

3. *Money.* Money has two meanings. In the general sense it means whatever has currency as money in payment of debts; this is called currency, or current funds. In a more restricted sense it means whatever is legal tender in the payment of debts, that is, money which a creditor must receive; this is called legal-tender money.

There are ten different kinds of current money in circulation in the United States.

1. Gold coin, now coined in denominations of $2.50, $5, $10, and $20, called respectively quarter eagles, half eagles, eagles, and double eagles. An eagle weighs 258 grains, of which $\frac{9}{10}$ is gold and $\frac{1}{10}$ alloy. The others weigh proportionally. These coins are full legal-tender money to any amount.

2. Standard silver dollars. A silver dollar weighs 412½ grains, of which $\frac{9}{10}$ is silver and $\frac{1}{10}$ alloy. These are full legal tender to any amount, unless otherwise expressly stipulated in the contract.

3. Subsidiary silver, namely, half dollars (192.9 grains), quarter dollars (96.45 grains), dimes (38.58 grains), all $\frac{9}{10}$ silver and $\frac{1}{10}$ alloy. These are legal tender for amounts not exceeding $10 in any one payment.

4. Nickel coin, namely, the five-cent piece, weighing 77.16 grains, of which $\frac{75}{100}$ is copper and $\frac{25}{100}$ nickel.

5. Bronze coin, namely, the one-cent piece weighing 48 grains, of which $\frac{95}{100}$ is copper and $\frac{5}{100}$ tin and zinc. These minor coins (nickel and cent) are legal tender for amounts not exceeding 25 cents in any one payment.

6. United States notes ("greenbacks"). These are full legal tender except for duties on imports and interest on the public debt.

7. Treasury notes of Act of 1890. These are full legal tender except when otherwise expressly stipulated in the contract.

8. Gold certificates issued against gold and bullion deposited in the United States Treasury. These are not legal tender, but are receivable for all public dues.

9. Silver certificates issued against silver dollars deposited in the Treasury. These have practically taken the place of the silver dollars for general circulation. They are not legal tender, but are receivable for public dues.

10. National-bank notes, issued by national banks against United States bonds deposited in the United States Treasury. These are not legal tender, but are receivable for all public dues except duties on imports; and one national bank is bound to receive the notes of other national banks.

Of course, gold certificates and silver certificates do not increase the volume of money. They simply represent so much coined money (or gold bullion) which is held for their redemption, and they circulate instead of the less convenient coin. They are a kind of warehouse receipt for money.

4. *Exchange.* Exchange is a method by which, without the actual sending of money, debts may be paid at distant points. A claim or credit one living in New York has against a debtor in London may be used to pay a debt one owes in London, or it may be sold to another debtor in New York and used by him to pay his creditor in London. A bank in New York may keep a credit with a bank in London and so be able to sell to New York debtors its checks on the London bank with which the New York debtors may pay their London creditors. It is, of course, far cheaper and safer to send to London an order on a London merchant or a London bank, than to send gold coin.

Example. B in New York sells to C in London cotton to the amount of £600, and draws a bill of exchange (order for money) on C payable to B's order sixty days after sight for that amount. (*a*) B may sell this bill to a banker or bill broker in New York. If D in New York owes E in London £600, D may buy this bill of the broker and send it to E, who presents it in London to C and gets his money. (*b*) B may discount the bill at his bank in New York. The bank may send it and other like bills to its correspondent bank in London and thus get a credit there. D may purchase of the New York bank its bill of exchange on the London bank and send this to E, who presents it at the London bank and gets his money.

Domestic exchange is that between different parts of the same country. It is sold by banks, express companies, telegraph companies, and even by the government in the form of post-office money orders.

Foreign exchange is between a city in one country and a city in another country. It is of two kinds: (*a*) bankers' bills, that is, bills of exchange or checks drawn by one bank on another; (*b*) commercial bills, that is, bills of exchange drawn by one merchant (creditor) upon another merchant (debtor). The latter may be drawn against a shipment of goods and be accompanied by the bill of lading, in which case they are called "documentary"; or they may be without accompanying documents of title, in which case they are called "clean bills."

Foreign exchange must be reckoned in the money of the country on which the bill is drawn. There is a par of exchange fixed. Thus an English pound sterling is equal to $4.8665 American money.[1] There may be, however, a slight premium or a slight discount equal approximately to the actual cost of shipping gold, which is about $\frac{3}{8}$ of 1 per cent on the amount shipped. As this is scarcely 2 cents on $4.8665, the premium or discount will rarely be more than $2\frac{1}{2}$ cents.

To the natural rate fixed by the par of exchange, with premium or discount, is added the commercial rate, depending on the abundance or scarcity of commercial bills and the price fixed for accommodating a person in New York with a bill of exchange on London or any other foreign city. If exchange is

[1] The United States Treasury will, on application, send an official Table of Values of Foreign Coins.

at par, one in New York could not buy a bill on London for £100 for $486.65, but would have to pay an added percentage. "Exchange" is often used in the sense of the added price paid for such a bill.

5. *Payment.* Payment is the discharge of a debt in money or its equivalent. It is the duty of the debtor to seek out his creditor and tender payment at the proper time. It is not the duty of the creditor to give a receipt unless the statute so provides, but it is customary to do so. The tender to be legally and technically correct must be of the exact amount in legal-tender money. If the creditor refuses a lawful tender, his refusal has the effect of stopping interest upon the debt, and, if the tender be kept good, of preventing costs in case he resorts to legal process to collect the debt.

If the debtor owes the creditor different debts, he may direct that a payment be applied toward the extinguishment of any one of them he may select. If the debtor makes no application, the law will apply the payment in a manner deemed most equitable and just to both parties.

A receipt, when given, is strong but not conclusive evidence that the sum named in it has been paid. It may be impeached for mistake or fraud.

As stated above, the larger part of the payments in the commercial world are now made by the use of checks or bills of exchange, while money, save in the case of small transactions, is used mainly to settle balances at the clearing house or between foreign cities.

82. Interest and usury. Interest is the compensation allowed by law or fixed by the parties for the use or forbearance or detention of money.

Legal interest is the rate of interest allowed by law. Parties may agree for less than this, but not for more unless a higher rate by special agreement is permitted by statute. If they agree for interest with no rate specified, the legal rate will be understood. In many states a legal rate is fixed for cases where there is no specific agreement, and a maximum rate for cases where there is an agreement. These statutes often

provide that an agreement for a rate higher than the legal rate but within the maximum rate shall be in writing.[1]

Usury is unlawful interest, that is, an agreement for interest greater than that allowed by law. Such a contract is illegal, but the effect of such illegality varies in different jurisdictions. In some the lender cannot recover any interest at all; in some he can recover neither principal nor interest; in some he forfeits only an excess above the specified rate.

In England, Massachusetts, and some other jurisdictions no maximum rate of interest is specified by statute, and parties may contract freely concerning the rate, except that an unconscionable rate might be evidence of oppression or undue influence. In most American states the rate is fixed by statute, ranging from 6% to 12%, and any agreement for interest above that rate would be usurious and illegal; but some of these states allow corporations to contract to pay any rate of interest agreed upon, and some allow banks to make large call loans upon negotiable security at any rate agreed upon. The object of fixing the maximum rate is to avoid oppression of borrowers, and it is thought that corporations and dealers upon stock exchanges (who secure call loans) are not likely to be subject to such oppression and should be left free to contract for any rate they may think the loan worth to them. Special rates, higher than ordinary rates, are also usually allowed to be charged by pawnbrokers.

Up to the time a debt becomes due and payable there is no interest allowed upon it unless the parties have provided for interest.

A sale of goods for $500 upon sixty days' credit would carry no interest during the sixty days unless it was provided that the credit should be "with interest." So a negotiable promissory note carries no interest until maturity unless interest is specified in the note. All debts bear interest after they are due and payable, such interest being regarded as a measure of damages for the wrongful detention of the money.

Compound interest is not favored in the law and will be allowed only when the interest due has by some new agreement

[1] See Interest Table at end of this chapter.

been incorporated with the principal or where expressly contracted for in the original agreement.

Example. B agrees to pay C $1000 three years from date with interest at 6% *per annum*, payable annually. B pays no interest and the three years have elapsed. C may recover the principal with simple interest, namely, $1180 (plus also interest from maturity to the date of the judgment). After judgment C is allowed interest on the total judgment debt at the legal rate.

83. Banks. Banks are financial institutions which receive money on deposit, loan money, sometimes issue money, deal in commercial paper, and facilitate exchange. There are several kinds of banks in this country.

National banks are chartered by the United States government with power to issue national bank-notes upon depositing as security therefor United States bonds. They are banks of deposit, discount, and loans, doing a general banking business. They may charge the rate of interest which the state where they are located has fixed for its own state banks. The penalty for usury is the recovery by the borrower of twice the amount of interest paid. National banks may be organized by not less than five persons. In any place having less than 3000 inhabitants they must have a capital stock of not less than $25,000; in a place of from 3000 to 6000, not less than $50,000; in a place of from 6000 to 50,000, not less than $100,000; in a place of over 50,000, not less than $200,000. On June 30, 1904, there were 5386 national banks with an aggregate capital of $776,904,335. On the same date the outstanding national-bank notes amounted to $449,235,095.

State banks are chartered by the state in which they are located, and, like national banks, are usually banks of deposit, discount, and loans. Owing to a national tax of ten per cent on all bank notes issued by state banks, none of them can profitably issue such notes.

Trust companies are chartered by states and are given many of the powers of banks of deposit, and are also authorized to act as fiscal agents, trustees, executors, administrators, etc. When a corporation wishes to issue bonds secured by mortgage it usually selects a trust company as trustee for the

bondholders. They often serve as agents or trustees in the organization or reorganization of corporations. Trust companies have increased greatly during the past few years, and now in New York City outnumber the national banks. Their powers are so large as compared with national or state banks that capitalists find it more profitable to invest in them than in the older and more conservative institutions. They are also much less restricted as to investments and security for loans.

Savings banks are, as the name implies, depositories for savings and not ordinary banks of deposit for live accounts. They pay interest on deposits and loan money on mortgages or other permitted securities at a higher rate. They are organized under state laws.

Private bankers are persons who carry on a banking business without forming a corporation. They may unite with banking proper a variety of other enterprises, and some of the largest financial operations are conducted through private bankers who promote or finance them. They often combine with a banking business that of stock or bond brokers.

If a bank receives deposits subject to check, it usually allows no interest; but savings banks, trust companies, and sometimes private bankers receive deposits not subject to check and allow interest, while national banks and state banks generally do not. A bank of deposit makes its profits on loans. Even if it pays interest it loans at a higher rate than it pays. Loans of banks of deposit are made on indorsed commercial paper or on collateral security. National banks are forbidden to loan on real-estate security, but savings banks and trust companies loan on such security.

84. Bank deposits. When money is deposited in a bank the depositor becomes the creditor of the bank to the amount of his deposit. In ordinary banks of deposit there is an implied understanding that the depositor may draw checks upon his deposits in favor of third persons, and that the bank will honor them. There is no such understanding in the case of ordinary debtors, and the debtor is not bound to honor any order upon him unless it be for the full amount of his debt. In savings

banks and in the case of interest-bearing deposits in other banks it is usually provided that some notice shall be given of an intention to withdraw any portion of the deposit, and that the deposit book shall be presented with the check or order. Ordinary deposits do not bear interest.

When money is deposited in a bank subject to check, the depositor usually receives a bank book in which each deposit is entered. This constitutes the evidence of his credits. When a check is paid the bank keeps it and this constitutes the evidence of its credits as against its depositor. The book and vouchers (paid checks) are then returned to the depositor, who should at once examine each check in order to ascertain that it is genuine, and should verify the account. If a forged or raised check has been paid, the loss falls upon the bank as between the bank and the depositor, but unreasonable delay in examining the checks after they are returned to him, or in notifying the bank of any irregularity, may estop the depositor from asserting his rights in this respect.

A depositor may have a note made by him payable at his bank. In that case, when the note falls due it is equivalent to an order upon the bank to pay it, and it is paid like a check and the note is included as a voucher when the account is written up. A depositor may, however, direct a bank not to pay from his deposit a note or check which he has made payable there. In this event the bank is bound to refuse payment unless it is itself the owner of the note, in which case, as creditor to that amount, it may offset the note against what it owes to the depositor.

Where one does not wish to draw checks against a deposit he may take a "certificate of deposit" from the bank. This is in the form of a receipt stating that "A. B. has deposited in this bank five hundred dollars payable to his order upon return of his certificate," and is signed by the cashier. If certificates are for a definite period, as three months, they are often made with interest. They are practically the promissory note of the bank.

85. Loans and discount; security. If one wishes to borrow money for temporary use in his business, he usually applies at

his bank for a loan. Assuming that he wishes to borrow $1000, he would make his promissory note for that amount (with or without security), payable at a specified time after date, and the bank would discount it and place the amount less the discount to his credit.

Discount is the taking of interest in advance upon a loan; it is incidental to banking, and bank discount is not usury, although the lender may thereby secure slightly more than the legal rate. It is technically discounting one's own commercial paper in order to raise money.

Discount is also used in the sense of purchasing for their present worth, or for less, notes made by one person and owned by another.

Examples. B wishes to raise money. He owns a note made by C; he sells this note to D. If he sells it for its present worth, there could be no question in any event of the validity of the transaction. But if he sells it for less than its present worth, the buyer will make a profit greater than the legal rate of interest. This, however, is not essentially usurious, any more than to buy a horse and make a profit upon it. If B does not indorse the note so as to become liable upon it himself, the sale may be for any price agreed upon. If B does indorse it, most courts still hold that the sale (if not a mere cover for usury) may be for any price agreed upon, although some courts hold this to be usurious if the buyer makes thereby more than the legal rate of interest.

In no case may a bank discount or purchase notes at a greater discount than the legal rate of interest. This limitation upon banks has created a class of dealers known as bill brokers, or popularly as "note shavers," who purchase such instruments at an agreed price for themselves or for other persons.

If one in borrowing money has to give security, this may be done by getting another person to indorse or guaranty his note, or by depositing collateral in the form of a pledge, or by giving a mortgage upon property. When there is an accommodation indorser the note is usually made payable to him, indorsed by him, and discounted at the bank by the accommodated party. If it is not paid by the maker when it is due, the indorser is notified and he is then liable to pay it. If the note is guarantied, it is made payable to the bank, and the guaranty is written

upon the back and signed by the guarantor. Upon nonpayment by the maker, the guarantor is liable without notice. Pledge of collateral security has already been treated (see sec. 65 *ante*). A mortgage is in form a conveyance of property upon condition that if a specified sum be paid to the mortgagee at a specified date the mortgage shall be void and of no further effect.

Interest Table

The following table shows the ordinary legal rate of interest and the maximum rate by special agreement in each state and territory. The special agreement must in most states be in writing.

State, etc.	Legal Rate	Maximum Rate	State, etc.	Legal Rate	Maximum Rate
Alabama	8	8	Montana	8	Any rate
Alaska	8	12	Nebraska	7	10
Arizona	6	Any rate	Nevada	7	Any rate
Arkansas	6	10	New Hampshire	6	6
California	7	Any rate	New Jersey	6	6
Colorado	8	Any rate	New Mexico	6	12
Connecticut	6	Any rate	New York	6	6
Delaware	6	6	North Carolina	6	6
District of Columbia	6	10	North Dakota	7	12
Florida	8	10	Ohio	6	8
Georgia	7	8	Oklahoma	7	12
Idaho	7	12	Oregon	6	10
Illinois	5	7	Pennsylvania	6	6
Indian Territory	6	10	Rhode Island	6	Any rate
Indiana	6	8	South Carolina	7	8
Iowa	6	8	South Dakota	7	12
Kansas	6	10	Tennessee	6	6
Kentucky	6	6	Texas	6	10
Louisiana	5	8	Utah	8	Any rate
Maine	6	Any rate	Vermont	6	6
Maryland	6	6	Virginia	6	6
Massachusetts	6	Any rate	Washington	6	12
Michigan	5	7	West Virginia	6	6
Minnesota	6	10	Wisconsin	6	10
Mississippi	6	10	Wyoming	8	12
Missouri	6	8			

REVIEW QUESTIONS AND PROBLEMS

SECTION **81**. What is capital? What is working capital? What is credit? How is it estimated? How are checks used for credit purposes? Explain the methods of a clearing house. What is a clearing-house certificate? What is money? What is currency? What is legal tender? State the kinds of United States money. Which are legal tender and to what amount? What is exchange? What two kinds of foreign exchange? What sends foreign exchange above par or below par? What is the natural limit of such fluctuation? What determines the commercial price of exchange? What is payment? What is the effect of refusing it? How is it applied if there be different debts? Must the creditor give a receipt? What is its effect?

Problem 1. B owes C $32. B tenders C silver in payment as follows: 15 silver dollars, 20 half dollars, 25 quarter dollars, 7 dimes, 1 nickel. C refuses to accept this, alleging it is not legal tender. C then sues B, and to avoid costs and interest B pleads the prior tender. Result?

Problem 2. B owes C a debt for $25 contracted in 1898, and one of $36 contracted in 1901. B in 1903 pays C $25 and directs C to credit it on the debt of $36. C credits it on the debt for $25. In 1905, after the debt for $25 is "outlawed," C sues B for $36. B pleads payment of $25. How much may C recover?

Problem 3. In above case B makes no request as to application of payment. How will it be applied?

82. What is interest? What is usury? What is the effect of usury upon a contract? What is the legal rate and the maximum rate of interest in your state? What debts carry interest? What is compound interest? When is it allowed?

Problem 4. B bought goods of C to the amount of $215 on three months' credit which expired July 7. On September 3 C brought suit in New York against B for this debt. On November 10 a judgment was entered for C. On January 15 this judgment was paid. (*a*) Assuming that the disbursements and costs allowed C by the court amounted to $24.25, how much should the judgment be entered for? (*b*) How much would be paid to discharge it on January 15?

Problem 5. B borrows of C in New York $100 for one year, and gives his promissory note for that amount with 6% interest. In addition B pays C a bonus of $5, that is, C really pays over to B on the loan only $95. C sues B on this note. B pleads usury. Result?

Problem 6. In the above case B is a corporation. Result?

83. What is a bank? Name and describe the different kinds of banks. How much capital must a national bank have in your city or village? Is there a state bank there? a savings bank? a trust company? a private banker? What advantages have trust companies over state or national banks? What are live accounts? What banks take deposits and allow interest?

84. What is the relation of a bank to a depositor? Who loses the money paid by a bank upon a forged check? If one has a note due and payable at a bank, explain what is done on the due date. What is a certificate of deposit?

85. Explain the process of borrowing money at a bank. What is discount? How great may it be? What is purchasing a note? For what price may a bank purchase a note made by X and owned by A? For what price may an individual purchase it? In what forms may one give security for a loan? What is a mortgage?

CHAPTER VIII

THE CONTRACT OF GUARANTY

86. Guaranty defined. A guaranty[1] is a promise to be answerable for another's debt, default, or obligation. It is a contract collateral to the main contract of the principal party

Example. B purchases goods of C on credit; D gives C a guaranty that B will pay for them, or in case B does not that D will.

The guarantor is he who gives the guaranty. The guarantee is he to whom the guaranty is given, that is, the creditor. The principal is he whose debt is guarantied, that is, the debtor. The word surety is sometimes used interchangeably for guarantor. But strictly a surety is one who is bound with the principal upon the original contract and in the same terms, while a guarantor is bound upon a collateral contract to make good in case the principal fails.

"We, A. B. as principal and C. D. as surety, hereby agree, etc.," would be a case of suretyship; while "I, A. B., hereby agree, etc.," followed by the indorsement, "I hereby guaranty[2] the performance or payment of the within contract. C. D.," would be a case of guaranty.

An indorsement of a negotiable instrument is a special form of guaranty, the indorser promising that he will be answerable for the amount of the note in case the holder makes due presentment to the maker, gives due notice of dishonor to the indorser, and in case of a foreign bill of exchange makes due protest. This is considered under the head of Negotiable Instruments.

[1] This is the same word as warranty, having preserved the Norman-French *g* which has been converted into the English *w* in warranty, as the French *Guillaume* becomes *William* in English. A warranty is a guaranty of the title or quality of goods. A guaranty is a warranty of credit, solvency, etc. (see Guaranty Insurance, sec. 74 *ante*).

[2] The verb is either "guaranty" or "guarantee." Sometimes one, sometimes the other, is used. So also the noun is written in both forms.

A guaranty of payment differs from a guaranty of collection. In the first case the guarantor agrees to pay if the principal does not; in the second he agrees to pay if the debt cannot be collected of the principal.

A continuing guaranty is an agreement to be responsible for moneys, goods, or services to be furnished the principal from time to time in the future.

87. A guaranty must be in writing. Under the Statute of Frauds (see sec. 22 *ante*) a promise to answer for the debt, default, or miscarriage of another must be in writing and signed by the party to be charged. Hence a guaranty of another's debt or promise must comply with this provision.

If the contract is strictly one of indemnity, namely, a promise to save another harmless from the results of some transaction into which the promisor induces him to enter, it is to be distinguished from a guaranty and need not be in writing. In such a case there are but the two parties.

Examples: 1. B promises C, an officer, that if the latter will attach D's goods he will guaranty him against loss or damage. This is an indemnity and not a guaranty, and need not be in writing. There are really but two parties here.

2. Sometimes it is very difficult to say whether a contract is one of guaranty or indemnity. B promises C that if the latter will go upon D's bail bond he (B) will make good any loss C may suffer. In England and in many American states this is treated as a contract of indemnity, while in other states it is treated as a contract of guaranty.

3. Again, the promise may be an original instead of a collateral one, in which case it is not a guaranty and need not be in writing. "If you will let B have these goods, I will pay for them." The promisor is primarily and not collaterally liable. Had he said, "I will pay for them if B does not," it would have been a guaranty.

4. Again, the promise may be to pay the debt out of funds put into the hands of the promisor for that purpose. D has moneys of C put into his hands to pay for goods sold to C by B. D promises B to pay. This is not within the Statute of Frauds. It is really a case of a trust.

In all doubtful cases it is safer to have the promise put into writing and signed. In some states it is necessary, also, that the writing should express the consideration upon which the guarantor's promise is based.

88. Consideration. When the contract of guaranty is made at the same time as the contract which it guaranties, the consideration which supports the principal's promise will also support the guarantor's.

When the contract of guaranty is made subsequent to the main contract, a new consideration is required to support it.

Examples: 1. "If you let B have these goods, I will guaranty payment for them. C." The delivery of the goods supports B's promise and also C's.

2. B owes A for goods already sold and delivered. C writes A, "I will guaranty B's debt to you." There must be some new consideration for this or the promise will be unenforceable. Such a consideration might be that A should bind himself to give B an extended time in which to pay.

89. Notice of acceptance by guarantee. Whether the creditor (guarantee) must notify the guarantor that he accepts the guaranty has been a very much discussed question. It is not necessary, of course, in the case of a contemporaneous guaranty, that is, a guaranty made at the same time as the main contract. The difficulty arises in a case of a guaranty as to future advances.

Example. C writes A, "I will guaranty payment of all goods you may let B have during the next year." Must A notify C that he accepts the guaranty, or will the delivery of goods to B constitute an acceptance? Generally in this country it is held that notice must be given in such a case, because the guarantor is entitled to know that his offer of guaranty has been accepted. In England and in some of our states no notice is necessary, the acceptance consisting in the doing of the act specified, that is, letting B have the goods. In view of this conflict it would always be safer to notify the guarantor that the guaranty has been accepted.

90. Notice to guarantor of the default of the principal. Whether the guarantee must notify the guarantor that the principal has defaulted in the payment or other obligation covered by the guaranty is also a disputed question. Some states require no notice, while others require notice, but do not agree as to the cases in which it must be given.

In states requiring notice these different holdings are found:

1. That the guarantor is always discharged for want of such notice if he is damaged thereby.

2. (*a*) That the guarantor is discharged for want of such notice if the amount for which he is bound is an indefinite one; but (*b*) that he is not discharged for want of notice if the amount for which he is bound is definite.

In view of this conflict and the nicety of the distinctions it is safer for the creditor to notify the guarantor, upon default of the debtor, of the fact of such default and that the creditor looks to the guarantor for payment.

There is also much conflict as to when the guarantee is bound to disclose to the guarantor at the time of making the guaranty some fact known to the guarantee concerning the honesty, fidelity, or solvency of the principal. In some cases a guarantor has been relieved of liability because the guarantee concealed such knowledge, but the cases are by no means clear as to what constitutes fraudulent concealment.

Examples: 1. X has been state treasurer, and, known to the state officers who are required to take and approve his bond, he has been guilty of defalcation. They take a bond from B and others as sureties for the fidelity of the treasurer, concealing this knowledge. This is fraudulent concealment and B and the other sureties are not liable. The same result would be reached if an employer, knowing of the dishonesty of his clerk, afterwards took a fidelity bond to assure his honesty, concealing the prior dishonesty.

2. X is known to C to be financially weak or insolvent. C takes an obligation from X with B as guarantor, concealing this fact. B is not relieved. This is not fraudulent concealment. So it has also been held not to be fraudulent to conceal that the principal has been gambling, or is already indebted to the guarantee. If, however, the guarantor asks the guarantee about such matters, he must answer fully and fairly if he answers at all.

91. What will discharge the guarantor. A guarantor may be discharged from his liability, and it remains to consider what will operate to work such a discharge.

1. *Discharge of the principal.* If the principal is voluntarily discharged or released, the guarantor is also discharged, unless he consents to such release. But he is not discharged by an involuntary release, as a release in bankruptcy by force of law.

A covenant by the creditor not to sue the debtor, coupled with a reservation of the rights against the guarantor, is held

in England and in some of our states not to discharge the guarantor; and an agreement for release with such reservation is construed to be a covenant not to sue. But this exception is not recognized in some of our states.

Examples: 1. B guaranties X's debt to C, who discharges X from liability, giving him a release under seal. B is also discharged.

2. In above (Example 1) X becomes embarrassed and creditors agree to take 60 cents on the dollar and release X. C receives his 60 per cent. X is released. So is B.

3. In above (Example 1) X goes into bankruptcy and is discharged by payment of 60 per cent. X is released but B is not. C may recover the additional 40 per cent from B.

2. *Alteration of contract.* If the creditor has altered the terms of the contract with the debtor without the consent of the guarantor, the latter is discharged.

Examples: 4. C guaranties payment for a specified engine to be sold by B to A. Afterwards A decides to take a different engine at a different price. C is discharged.

5. C guaranties payment of a note from B to A, due on September 11. B and A by mutual assent change the note to read October 11. C is discharged. His contract is destroyed by an alteration made without his consent. It would be the same if the date were changed to August 11.

3. *Extension of time to debtor.* If the creditor definitely extends the time of payment to the debtor without the consent of the guarantor, the latter is discharged.

Example 6. C has guarantied to B the payment of a debt due from A on April 1. B in consideration that A will give him a note extends the time to June 1. C is discharged.

7 (*Exception*). There is an exception to this rule in the case where the creditor while extending the time to the debtor expressly reserves his right against the guarantor. This is because the rights of the guarantor against his principal are not impaired, since the latter impliedly agrees that the guarantor may at once pay the debt to the creditor and proceed against the principal for indemnity.

A mere forbearance to sue, or an unenforceable promise to forbear, is not an extension of time to the debtor.

4. *Surrender of securities by creditor.* If the creditor surrenders to the debtor securities held for the enforcement of the debt, the guarantor is discharged to the extent he may be injured thereby.

5. *Failure of creditor to proceed against debtor after notice.* In New York and some other states, if the guarantor directs the creditor to proceed against the debtor and the creditor fails to do so, the guarantor is discharged if the debtor afterwards becomes insolvent. This is also a statutory rule in some states; but generally it is not in force, and it does not apply, even in New York, to an indorser of a negotiable instrument.

6. *Revocation by guarantor.* If the consideration for a guaranty consists of an act to be done in the future by the guarantee, a notice of revocation before the act is done will be effectual and will relieve the guarantor. If the consideration consists of a series of acts to be done by the guarantee, notice of revocation will be effectual as to those not yet done, but will be ineffectual as to those already done.

Example 8. B writes to X, "If you let C have goods for his store during the coming year, I will guarantee payment." On January 10 X lets C have goods to the value of $150, and on February 5 to the value of $175. On March 1 B notifies X that he will be no longer liable for goods sold C. On March 15 X lets C have $250 worth of goods. B is liable as guarantor for $325, but not for the $250.

7. *Death of guarantor.* The death of the guarantor has the same effect as an express revocation, though some states require that the guarantee should have actual notice of the death in order that it should operate as a revocation.

Example 9. In Example 8, suppose B died on March 1. In many states this would operate to revoke the guaranty as to any advances made thereafter. In other states it would operate only from the time X had notice of it. In any event B's estate would be liable for the advances made before his death.

Surety. In the case of a surety, as distinguished from a guarantor, some special results of revocation or death must be noted. (1) It is a technical rule of the law (when not modified by statute) that where an obligation is joint the death of one joint obligor extinguishes the liability as to him, and the survivor alone is liable. If A as principal and B as surety jointly promise to pay C, the death of B relieves his estate. But if the promise is joint and several ("We, A as principal and B as surety, jointly and severally promise to pay C $100"), the death of one party does not relieve his estate. This technical rule has now been very generally changed by statute so that the death of a joint obligor does not extinguish

the claim as to his estate. Under the above rule the death of a joint surety would of course revoke liability as to future advances. (2) If the suretyship is joint and several, the death of the surety does not revoke the suretyship, as does the death of a guarantor. A guaranty is collateral, but a suretyship is a part of the original contract itself and stands or falls with it. (3) (*a*) In the case of an indemnity bond for an indefinite period the surety may at any time give notice of revocation, leaving the employer whose employee's fidelity was assured a reasonable time to get other sureties. (*b*) But in the case of indemnity bonds for a definite period the surety cannot withdraw unless the employee or officer has defaulted so that he may be removed, or unless the surety has reserved in the bond the right to withdraw upon due notice. (*c*) The death of a surety on a joint and several bond does not terminate the liability of his estate even as to a breach by the principal occurring after the death of the surety.

An indemnity is in some respects like a suretyship and in some like a guaranty.

8. *Retention of principal after knowledge of his dishonesty.* If the guaranty be against the dishonesty or defalcation of the principal, the guarantor will be discharged if the guarantee, after knowledge of the principal's dishonesty, continues him in his service.

9. *Main contract nonenforceable against principal.* If the main contract is illegal, and so not enforceable against the principal, the collateral contract of guaranty is also nonenforceable. This rule has been applied to usurious contracts. So also, if the main contract was procured from the principal by fraud and cannot for that reason be enforced, the guaranty of it is also unenforceable. The same has been held of contracts procured by duress, but some cases have escaped this rule where the guarantor signed with knowledge of the duress. Failure of consideration which renders the main contract nonenforceable also relieves the guarantor.

But the fact that the principal is an infant, or of unsound mind, or a married woman, and so may escape liability, will not release the guarantor. These are defenses personal to the principal and the guarantor cannot avail himself of them.

92. Guarantor's liability. The guarantor's liability is fixed by the terms of the contract. This may stipulate for a definite sum or for such sum as the debtor is liable for. The guarantor

may be compelled to pay without resorting to the principal debtor, unless, indeed, he has merely guarantied the collection of a debt, in which case the creditor must first exhaust his remedies against the debtor.

Examples: 1. "I hereby guaranty the within note. C." The holder of the note may proceed against C without first proceeding against the maker of the note.

2. "I hereby guaranty the collection of the within note. C." The holder must first exhaust his remedies against the maker before proceeding against C.

93. Guarantor's remedies. A guarantor who has paid his principal's debt or obligation is entitled to the following remedies.

1. *Indemnity against principal.* The guarantor may recover from his principal all money properly paid on account of the guaranty, together with any costs reasonably incurred in defending the creditor's claim. In order to safeguard himself the guarantor should give the principal notice of an intended payment in order that the principal may interpose to the creditor's claim any defense he thinks fit.

2. *Subrogation to rights of creditor.* The guarantor is entitled to be subrogated to all collateral securities held by the creditor for the payment of the debt.

Example 1. B borrows money of A and gives as security certain bonds in pledge and also the guaranty of C. C pays the debt to A. C is entitled to the bonds in pledge as security for his claim against B.

3. *Contribution from co-guarantors.* If two or more persons are joint guarantors for the principal, and one of them pays the entire debt, he is entitled to a *pro rata* contribution from his co-guarantors. If one be insolvent, or out of the jurisdiction, the others may be compelled to contribute ratably.

Example 2. C, D, and E are co-guarantors for a debt of $1200 owed to B by A. C pays the entire debt. He is entitled to recover at law $400 each from D and E. If E be insolvent and unable to pay, then C may recover in equity $600 from D.

Forms of Guaranty

A general guaranty, or "letter of guaranty," of future advances may be as follows:

I hereby guaranty to any person advancing money (or selling goods, or whatever the act may be) to [*Principal*] not exceeding ——— dollars, the payment therefor at the expiration of the credit which shall be given.

(Date)..... (Signature) [*Guarantor's Name*]

(Address).....

A special guaranty of future advances may be as follows:

To [*Guarantee or Creditor*]

I will be responsible for goods (specify a particular kind if desired) sold by you to [*Principal*] to an amount not exceeding in value an aggregate of ——— dollars.

(Date)..... (Signature) [*Guarantor's Name*]

(Address).....

A guaranty of contemporaneous credit may be as follows, and would usually be attached to another contract:

In consideration of the agreement of [*Principal*] above set forth, I hereby guaranty to the said [*Creditor*] that the above-named [*Principal*] will well and faithfully perform everything by the foregoing agreement on his part to be performed at the times and in the manner above provided.

(Date)..... Signature [*Guarantor*]

A guaranty of a past credit should state a new consideration.

In consideration of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, I hereby guaranty, etc.; *or*,

In consideration of the extension of time given by [*Creditor-Guarantee*] to [*Debtor-Principal*] upon the above agreement, I hereby guaranty, etc.; *or*,

In consideration of the discontinuance of proceedings by [*Creditor-Guarantee*] instituted by him against [*Debtor-Principal*] I hereby guaranty, etc.

REVIEW QUESTIONS AND PROBLEMS

Section **86**. Define guaranty; guarantor; guarantee; principal. Distinguish a surety from a guarantor; an indorser from a guarantor; guaranty of payment from guaranty of collection. What is a continuing guaranty?

87. How must a guaranty be evidenced? Does this extend to an indemnity contract? Distinguish an indemnity contract.

Problem 1. X buys goods of C. B says, "If you let X have the goods, I will pay you if he does not." X does not pay. C sues B. Result?

88. Does a guaranty require a consideration? What constitutes the consideration in a contemporaneous guaranty? in a subsequent guaranty?

Problem 2. X buys goods of C, payable in thirty days. At the end of the thirty days B writes C, "If you will give X thirty days more, I will be answerable for his paying the claim." C takes X's note for thirty days more. It is not paid. C sues B. Result?

Problem 3. In above case C does not take a note, but simply refrains from suing X for thirty days. Result?

89. Is it necessary to communicate to the guarantor an acceptance of the guaranty? When?

90. Is it necessary to give the guarantor notice of the default of the principal? If so, under what circumstances? Is the guarantee bound to inform the guarantor of facts known to him affecting the risk? Illustrate.

91. What will discharge a guarantor? Will bankruptcy of principal? Will covenant not to sue principal? Will release of principal reserving rights against guarantor? Illustrate alteration of contract. What is an extension of time to the debtor? Effect of surrendering securities by creditor? Is creditor bound to proceed against debtor if requested by guarantor? When may a guaranty be revoked? What is the effect of the death of a guarantor? of a surety? Difference between joint promises and joint and several promises? What are the rights of a surety on an indemnity bond? When will inability to enforce the main contract discharge the guarantor and when not?

Problem 4. B guaranties X's debt to C. Afterwards C gives X a release, and then sues B on the guaranty. Result?

Problem 5. In above case C releases B and then sues X. Result?

Problem 6. B guaranties X's debt to C. Afterwards C gives X "a release in full of said claim, reserving, however, all rights in respect thereto against B." C sues B on the guaranty. Result?

Problem 7. B guaranties X's debt to C. Afterwards C gives X a valid and enforceable extension of time. When this time expires X does not pay and C sues B. Result?

92. May the guarantee proceed against the guarantor without first proceeding against the principal? Illustrate.

Problem 8. X gives C a promissory note. B writes and signs on the back of the note, "I hereby guaranty the collection of the within note." X does not pay the note. C sues B. Result?

93. What are the guarantor's remedies against the principal? What is his right of subrogation? of contribution?

Problem 9. X gives C a promissory note secured by a mortgage on X's property. B guaranties the payment. After maturity C sues and recovers from B. What are B's rights against X?

Problem 10. X owes C, and B, D, and E guaranty the debt. C recovers from B. What are B's rights?

CHAPTER IX

NEGOTIABLE INSTRUMENTS

I. Nature and Characteristics

94. Kinds of negotiable instruments. Negotiable instruments are written contract obligations which can be transferred from hand to hand like money. They are instruments of trade or of credit, that is, they are a substitute for money or an evidence of a postponed debt. They may be issued by private persons, or by banks, or by the government.

Examples: 1. If B buys a bill of goods of C, he may (*a*) pay money, which may be either coin, promises of the government to pay, or promises of a national bank to pay; (*b*) give a check on his bank; (*c*) give his promissory note; (*d*) accept a bill of exchange drawn on him by the seller; (*e*) transfer D's check, promissory note, or bill of exchange drawn or payable to his (B's) order or to bearer; (*f*) draw and deliver a bill of exchange on E (who owes B) payable to C's order. In any case, as above, B has given C a negotiable instrument, except where he pays coin. But even coined money is in fact a negotiable chattel, for whatever title or want of title there may have been in B the taker of it for value gets a good title.

2. If any instrument given above is payable on demand, it is essentially an instrument of trade taking the place of money. But if it is payable at some future day it becomes essentially an instrument of credit, because B secures a postponement of the payment of his debt, that is, secures a term of credit from C. But even an instrument payable on demand is also one of credit, because until actually presented for payment it is taken on the credit of the one issuing it.

The principal kinds of negotiable instruments are as follows:

(*a*) Bills of exchange, foreign and inland. These are *orders* by one person to another to pay money to a third person or some one named by him, or to bearer (sec. 96).

(*b*) Promissory notes, including notes and certificates of deposits by banks. These are *promises* by one person to pay money to another or some one named by him, or to bearer (sec. 96).

(*c*) Checks, or orders by depositors on their banks to pay money to a third person or some one named by him, or to bearer (sec. 96).

(*d*) Bonds, or promises in a special form by corporations, cities, or governments to pay money to a person, or to a person named by him, or to bearer (sec. 96).

The instrument first used was the foreign bill of exchange by which merchants in one country were enabled to pay debts in another country without the risk of sending money across seas. The Florentines or the Venetians introduced these instruments into England as early as the thirteenth century. The inland bill was later introduced to serve the same purpose between different parts of the same country. In this country an inland bill is one drawn and payable within the same state. A bill drawn in New York and payable in Chicago would be by our law a foreign bill.

Example 3. B in New York wishes to pay a debt to C in London. (*a*) If B has a debtor, D, in London, he may draw a bill of exchange on D payable to C or order and send it to C, who can present it to D and obtain payment. (*b*) B may buy in New York a bill of exchange drawn by F in New York on his debtor, E, in London, payable say to G's order. G sells and indorses it to B, and B indorses it to C and sends it to C, who presents it to E and obtains payment. (*c*) B may buy at a New York bank a bill of exchange drawn by that bank on a London bank, payable to C or his order; B sends it to C, who presents it at the London bank and receives payment. By these methods payments are made between New York and London, or *vice versa*, without transferring money. In the end some big banking concern in one place may export gold to the other place to settle balances.

A check is a special kind of bill of exchange, being a bill drawn by a depositor on his bank, payable on demand. A bill of exchange drawn by one bank on another is often called a draft. It is simply a check and is more properly called a cashier's check.

Promissory notes were once held by the English courts not to be negotiable instruments, but Parliament in 1704 passed an act providing that they should be negotiable the same as bills of exchange, and such is the law in this country. When

these are issued by banks we call them bank notes. A certificate of deposit is another form of promissory note issued by a bank to one who deposits money and takes the note of the bank for it. Corporations and governments issue long-time promises to pay in the form of bonds, which in the case of private corporations are usually secured by a mortgage on the corporate property.

Bills of lading at common law, and warehouse receipts by statute, are given a quasi-negotiable character, but these do not fall within the generally accepted category of negotiable instruments. Stock certificates have also a quasi-negotiable standing. The first two are promises to deliver goods and the last is an evidence of an interest in a business enterprise, while negotiable instruments have to do with unconditional promises or orders to pay money. The above instruments resemble negotiable instruments mainly in the fact that they are transferred from hand to hand by indorsement, but they are not, like negotiable instruments, a kind of substitute for money. They are paper evidences of some property right.

95. Characteristics of negotiable instruments. There are three characteristics that serve to distinguish negotiable instruments from ordinary contracts.

1. *Presumptive consideration.* If a contract is in the form of a negotiable instrument, it has a presumption of consideration, whereas in an ordinary contract one who brings an action upon it must prove that the promise he is seeking to enforce rests upon a consideration.

Example 1. (*a*) "On April 1 next, I promise to pay to the order of A. B. one hundred dollars. C. D." (*b*) "On April 1 next, I promise to deliver to the order of A. B. one hundred bushels of wheat. C. D." In the first example, A. B. in an action against C. D. need not prove any consideration; it is for C. D. to prove that there was none, if he can do so. In the second example, A. B. in an action against C. D. must prove the consideration for the promise to deliver the wheat, and if he fails to do so he will be defeated in his action.

2. *Days of grace.* Unless abolished by statute, three days of grace beyond the time fixed are allowed for the payment of negotiable instruments, whereas in ordinary contracts no days of grace are allowed. In the examples given above, A.B. could not demand payment of the money until April 4, while he

could demand delivery of the wheat on April 1. Days of grace have been very generally abolished by statute. They were established when means of communication between distant places were uncertain and slow; with the introduction of steam the need for them has disappeared.[1]

3. *Negotiability.* Negotiability is the important characteristic of these instruments. As we have seen (sec. 35), ordinary contracts are often assignable, but the assignee cannot sue in his own name except by force of statute, and when he sues he is subject to all the defenses that might have been set up against his assignor. Bills, notes and checks, however, are negotiable, not merely assignable. Negotiability carries with it the following results: (*a*) the transferee gets a legal title and can sue in his own name; (*b*) if the transferee is a holder for value and without notice, he is free from the defenses that might have been set up against his transferror, except those that operate to destroy the contract altogether. He is not subject to the personal defenses of fraud, duress, want of consideration, want of title in the transferror, and the like, but is subject to the absolute defenses of forgery, alteration, infancy of maker, that the statute declares the instrument void (as it does a gambling contract), etc. It is this element of negotiability that makes it necessary to treat these contracts separately.

Example 2. (*a*) In Example 1, given above, assume that A. B. indorses and delivers the note to E. F. on March 15, and that E. F. sues the maker C. D. If E. F. paid value and had no notice of any defect in A. B.'s title, C. D. cannot defend on the ground that A. B. procured the note by fraud or without consideration; but the defense that C. D.'s name is forged, or that the note has been altered, would be a good defense. (*b*) In Example 1, assume that A. B. indorses and delivers to E. F. the promise to deliver the

[1] In the following states or territories days of grace are still allowed upon bills or notes payable at a future time: Alabama, Alaska, Arkansas, Indiana, Kansas, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Mexico, South Carolina, South Dakota, Texas, Wyoming.

In many of these states bills of exchange payable at sight are also entitled to days of grace. In some states in which days of grace are abolished on instruments payable at a fixed future time they are still allowed on bills of exchange or drafts payable at sight, as, for example, in Maine, Massachusetts, New Hampshire, and Rhode Island.

wheat, and that E. F. pays value and has no notice of any defect. If E. F. sues C. D., any defense that would be good against A. B. is still good against E. F. This is an assignment, and an assignee stands in his assignor's shoes.

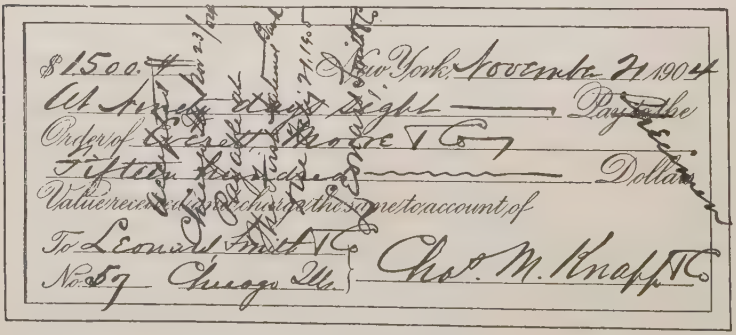
96. Definitions. The various negotiable instruments are named and defined as follows.

1. *Bill of exchange.* A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it (called the drawer), requiring the person to whom it is addressed (called the drawee) to pay on demand or at a fixed or determinable future time a sum certain in money to the order of a designated person (called the payee), or to bearer.

The person upon whom the bill is drawn, that is, the drawee, may be asked to signify his assent to honor the bill, and if he does so he becomes an acceptor. This assent is usually signified by writing his name with the word "Accepted" across the face of the bill. When a bank so signifies its assent to honor a check the check is said to be "certified."

If not payable to order or bearer, the bill would be non-negotiable.

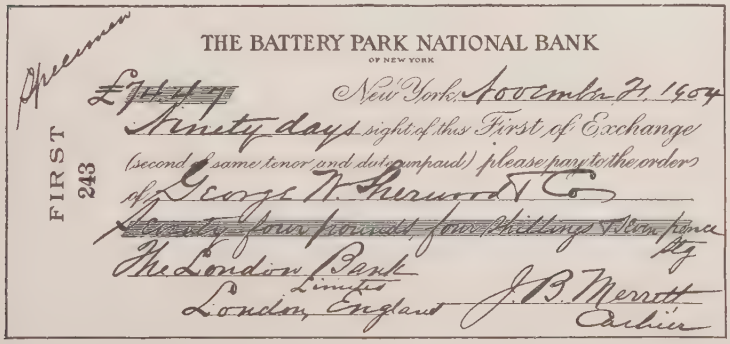
Bill of Exchange with Acceptance

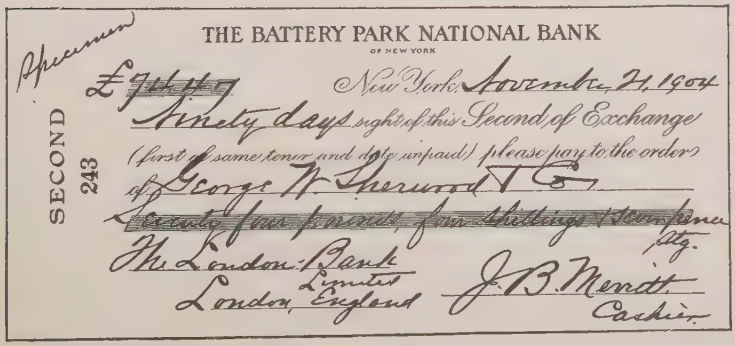


The above bill was accepted Nov. 23, 1904. It was due ninety days from sight, and hence became due ninety days from November 23, or on Feb. 21, 1905. It could be transferred by an indorsement on the back by Everett, Moore & Co., the payees.

A foreign bill of exchange is often drawn in a set of two or three duplicate parts, each part numbered and referring to the others. The parts are used to avoid the chance of loss in the mails, or to save time in securing an acceptance.

BILLS IN A SET


THE BATTERY PARK NATIONAL BANK
OF NEW YORK
Pfeffermann
£ 7 4 7
New York, November 21, 1904
FIRST
243
Ninety days sight of this First of Exchange
(second of same tenor and date unpaid) please pay to the order
of George N. Sherwood & Co.
Seventy four pounds four shillings & seven pence
Stg.
The London Bank
Limited
London, England
J. B. Merritt
Cashier


THE BATTERY PARK NATIONAL BANK
OF NEW YORK
Pfeffermann
£ 7 4 7
New York, November 21, 1904
SECOND
243
Ninety days sight of this Second of Exchange
(first of same tenor and date unpaid) please pay to the order
of George N. Sherwood & Co.
Seventy four pounds four shillings & seven pence
Stg.
The London Bank
Limited
London, England
J. B. Merritt
Cashier

If there were three parts, the first would read, "second and third of same tenor and date, unpaid," and the second would read, "first and third of same tenor and date, unpaid," and the third would read, "first and second of same tenor and date, unpaid."

(*a*) Suppose Sherwood & Co. buy the above exchange in New York in order to pay a debt to James & Co. in Calcutta, India. Were it payable at sight or at a fixed future time, they would indorse each part to James & Co. and send one part by one steamer and another by a second steamer in order to avoid danger of loss or delay. In such case two parts would be enough.

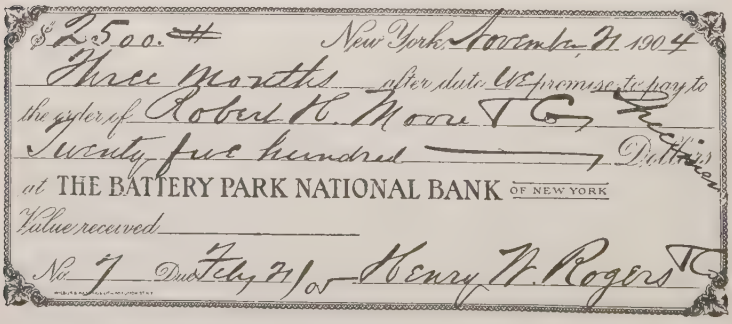
(*b*) As it is payable after sight, if it is all sent to Calcutta and from there to London it would be weeks before any part could be presented for acceptance, and it would then run ninety days after such presentation. But if one part is sent direct to London for acceptance, the final due date will be hastened and the present worth of the bill increased. Therefore one part is sent to London indorsed, "At the disposal of the second or third, duly indorsed." The second and third will then be indorsed to James & Co. and sent to Calcutta by different mails with the information that the first has gone direct to London for acceptance. James & Co. in Calcutta can then deal with the bill, assuming it would be accepted about December 1 and would become due ninety days thereafter. They will send parts two and three to London in time to have them there when the bill becomes due, or they will sell them in Calcutta and the buyer will send them to London.

The drawee should accept but one part, for if he accepts two each might be indorsed to different holders and the acceptor would be liable on each. A holder should not indorse parts to different persons or he will be twice liable. When the bill is paid the acceptor should take up the part he has accepted.

2. *Promissory note.* A promissory note is an unconditional promise in writing made by one person (called the maker) and signed by him, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to the order of another person (called the payee), or to bearer.

If not payable to order or bearer, the note would be non-negotiable.

Promissory Note

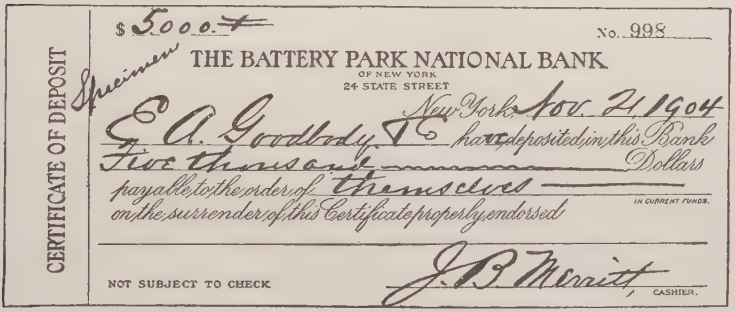

$2500.00
New York November 11 1904
Three Months after date We promise to pay to
the order of Robert H. Moore & Co.
Twenty five hundred Dollars
at THE BATTERY PARK NATIONAL BANK OF NEW YORK
Value received
No. 7 Due Feby 11/05 Henry W. Rogers

It is not necessary to state the place where the note is payable, but this is usually done in commercial paper in order to facilitate presentment for payment. This note may be indorsed on the back by Robert H. Moore & Co. The words "with interest" may be written in after the words "value

received," if the note is to draw interest. The above note may be discounted, say at the bank where payable, that is, the payee may indorse and sell it to the bank for its present worth. How much is $2500 payable in three months worth in New York where interest is six per cent?

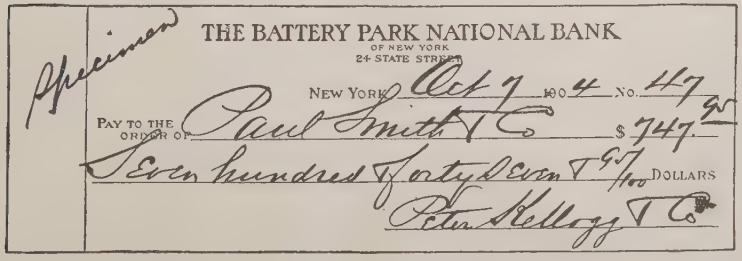
3. *Certificate of deposit.* A certificate of deposit is in effect a promissory note given by a bank to a depositor, acknowledging the receipt of the deposit and promising to pay it to the order of the depositor. It may be made payable on demand, or it may be made payable at a fixed future time with interest. If one has a special fund which he wishes to put into a bank but against which he does not wish to draw checks, he ordinarily takes a certificate of deposit.

CERTIFICATE OF DEPOSIT



4. *Check.* A check is a bill of exchange drawn on a bank and payable on demand. If payable at a future time, it would

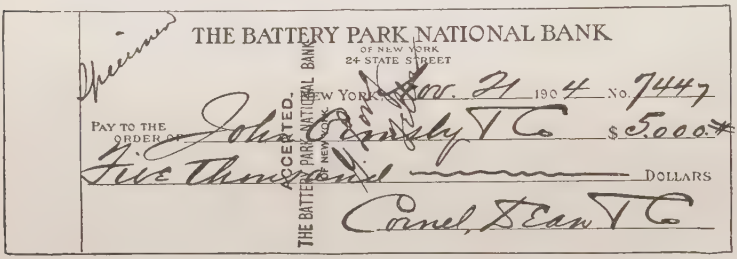
CHECK


Specimen
THE BATTERY PARK NATIONAL BANK
OF NEW YORK
24 STATE STREET
NEW YORK Oct 7 1904 No. 47
PAY TO THE ORDER OF Paul Smith & Co
$ 747.97
Seven hundred forty seven 97/100 DOLLARS
Peter Kellogg & Co

be an ordinary bill of exchange. When one deposits money in a bank he receives a bank book, with the amount he has

deposited entered in it. He can then draw checks against this deposit. If a payee wishes to be sure that the check is good, he can ask the drawer to have it certified. When certified, the bank becomes liable to the payee, and it charges the certified check against the depositor's account as a check which it has actually paid.

Certified Check


THE BATTERY PARK NATIONAL BANK
OF NEW YORK
24 STATE STREET
New York Nov. 21 1904 No. 7447
PAY TO THE ORDER OF John Crosby & Co. $5000
Five Thousand DOLLARS
ACCEPTED. THE BATTERY PARK NATIONAL BANK OF NEW YORK
Cashr.

The words "Accepted," "Certified," "Good" are all used to signify that the bank has honored the check.

5. *Bank draft or check.* A bank's check, often called a "draft," is a check drawn by one bank upon another bank and payable on demand. If payable at a future time, it is a bill of exchange

Bank Draft or Check

No. 1958
Countersigned by George E. Mannerly Pro tem.
Ithaca Trust Company
Pay to the Order of
Ithaca, N. Y. May 2 1905
William H. Fremantle $3500
Thirty five hundred Dollars
TO THE METROPOLITAN TRUST CO. OF THE CITY OF NEW YORK.
M. N. Porter
Cashier

but not a check. One bank often keeps deposits in another bank in order to be able to furnish these bank drafts or bills. A country bank will need to be able to furnish New York

exchange, and even a New York bank, if not a member of the New York Clearing House, will need to be able to furnish drafts or checks upon a New York bank that is a member of the clearing house. So a large bank may keep accounts with a London bank in order to issue its checks or bills on London and furnish London exchange.

These drafts or banker's checks are usually drawn without being countersigned by the president, but some banks require this out of extra caution.

In the example of a bill in sets given above we have a banker's bill of exchange. It is drawn by a New York bank on a London bank and is payable ninety days after sight, that is, ninety days after it is first presented at the London bank. This is called "London exchange"; it is a bill of exchange drawn on a bank in London.

6. *Bonds.* A negotiable bond is in effect a promissory note under seal issued by a corporation, government, or governmental political division like a city or county. At common law a negotiable instrument could not be under seal; if an instrument otherwise negotiable was duly sealed, it thereby ceased to be negotiable. But by custom recognized by courts these instruments issued by corporations and governments under the corporate or governmental seal came to be regarded as negotiable. But not all bonds are negotiable. Bonds are either "coupon bonds" or "registered bonds." The latter are bonds payable to a specified person whose name is registered in the books of the corporation or government, and they are transferable only by registering the name of the transferee. Coupon bonds are bonds payable to a person, or order, or bearer, and have attached to them coupon notes for each installment of interest as it falls due. These coupons are cut off and presented for payment of interest, or they may be severed before maturity and negotiated like a promissory note. The negotiable bond is usually a coupon bond payable to bearer. A bond is a quite formal instrument containing not only the negotiable promise but also specifications concerning the particular issue of bonds of which it is one, and the mortgage security therefor. Since a mortgage cannot well be made

NUMBER 25

NEW HAVEN WATER COMPANY

FIRST MORTGAGE BOND

UNITED STATES AMERICA — STATE OF PENNSYLVANIA

500

The New Haven Water Company, *a corporation duly organized and existing under the laws of the State of Pennsylvania, for value received hereby promises to pay to The Safe Deposit Company of Pittsburgh, County of Allegheny, in the State of Pennsylvania, or bearer, the sum of*

Five Hundred Dollars

lawful money of the United States of America, on the first day of October in the year nineteen hundred and five, together with interest on said sum from the date hereof at the rate of six per centum per annum, payable semi-annually on the first days of October and April in each year at the office of The Safe Deposit Company of Pittsburgh, in the State of Pennsylvania, on presentation of the coupons hereto attached as they severally become due.

This bond *is one of a series of thirty bonds, numbered consecutively from one to thirty, both numbers inclusive, each of the denomination of five hundred dollars, all being of like tenor and date, and all secured by first mortgage upon the water works of said The New Haven Water Company, in and near the Borough of New Haven, in Fayette County, Pennsylvania, together with lands, machinery, pipes, properties, rights, privileges and franchises now held and owned or hereafter to be acquired by it, and all its tolls, income, rents, issues and profits, executed by said The New Haven Water Company to The Safe Deposit Company of Pittsburgh, of the County of Allegheny, in the State of Pennsylvania, Trustee, and dated the first day of October, 1885, and duly acknowledged according to law and recorded in the proper records in the Recorder's Office in Fayette County, in the State of Pennsylvania. This bond shall not become obligatory until authenticated by the execution by said trustee of the certificate hereto attached.*

In Testimony Whereof, *the said The New Haven Water Company has caused this instrument to be sealed with its Corporate Seal, and to be signed by its President and Secretary and the coupons hereto attached to be signed by its Treasurer, at New Haven aforesaid this first day of October, 1885.*

The New Haven Water Company,

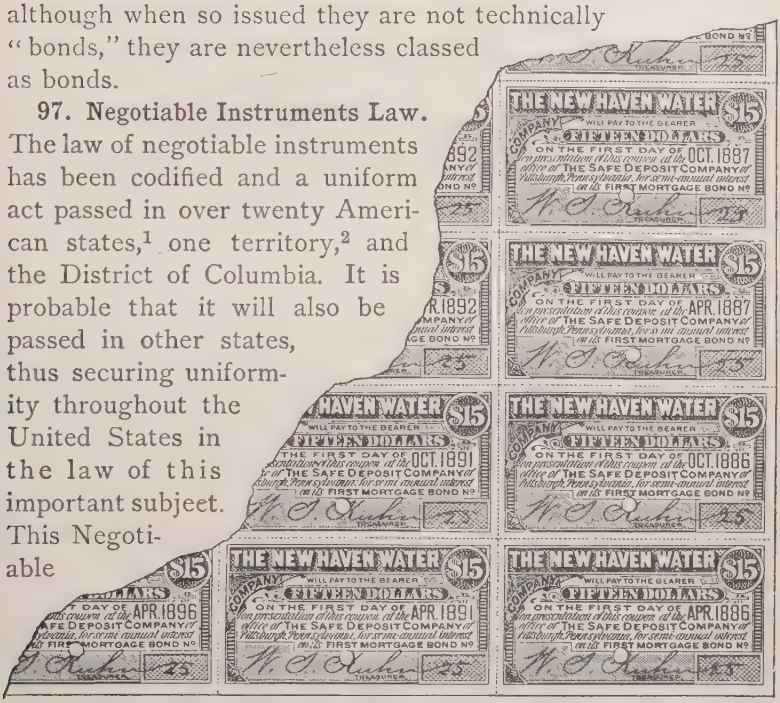
CORPORATE SEAL

By John G. Crabtree
President.

And by Austin Bullock
Secretary.

to each bondholder, it is made to a trustee or trustees for the benefit of bondholders. The bond is signed by the proper officials and usually bears the corporate or governmental seal. But these instruments are sometimes issued without a seal, and although when so issued they are not technically "bonds," they are nevertheless classed as bonds.

97. Negotiable Instruments Law. The law of negotiable instruments has been codified and a uniform act passed in over twenty American states,[1] one territory,[2] and the District of Columbia. It is probable that it will also be passed in other states, thus securing uniformity throughout the United States in the law of this important subject. This Negotiable


THE NEW HAVEN WATER
$15
WILL PAY TO THE BEARER
FIFTEEN DOLLARS
ON THE FIRST DAY OF OCT. 1887
ON THE FIRST DAY OF APR. 1887
ON THE FIRST DAY OF OCT. 1886
ON THE FIRST DAY OF APR. 1886
THE SAFE DEPOSIT COMPANY
FIRST MORTGAGE BOND

COUPONS

Instruments Law will be followed in this chapter. It supersedes the common, or unwritten, law of negotiable instruments.

This law is based upon a similar codification in England known as the Bills of Exchange Act. This English act is also in force in most of the English colonies.

[1] Colorado, Connecticut, Florida, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, New Jersey, New York, North Dakota, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Virginia, Washington, Wisconsin, Wyoming.

[2] Arizona.

II. FORM

98. What a negotiable instrument must contain. An instrument to be negotiable (and not merely a common law contract) must conform to the following requirements.

1. It must be in writing and signed by the maker or drawer. A writing includes print, and the writing may be in pencil.

Examples: 1. One may sign in a trade or assumed name. Even the indorsement by figures 1, 2, 8 has been held sufficient.

2. Only the person who signs is liable. The signature "A. B., agent," or "C. D., treasurer," binds only A. B. or C. D. and not his principal, for these are mere terms of description. The signature should be "X. Y., by A. B., agent," or "X. Y. Co., by A. B., treasurer." By the custom of banks the signature "E. F., cashier," binds the bank whose name appears on the instrument.

3. A forged signature does not bind the one whose name is forged. No rights can be acquired by any holder under a forged signature.

2. It must contain an unconditional promise or order to pay a sum certain in money. A promissory note contains a promise. A bill of exchange, or check, contains an order. The point is that these must be unconditional.

Examples: 4. "I O U twenty dollars" is not a promise but a mere acknowledgment. So also, "Due you twenty dollars."

5. "Be so kind as to let the bearer have twenty dollars" may, perhaps, be too civil to be regarded as an "order."

6. "I promise to pay to order of A. B. twenty dollars out of proceeds of Blackacre farm" is conditional and therefore nonnegotiable. There may not be proceeds from that farm sufficient to pay.

7. "Pay to order of A. B. twenty dollars and charge to account of Blackacre farm" is unconditional, because it merely indicates the fund from which reimbursement is to be made.

8. "Pay to the order of A. B. all the proceeds of Blackacre farm" is nonnegotiable because the sum is uncertain. But the law permits payment "with exchange" or with "costs of collection or attorney's fees in case not paid at maturity," although these may render the sum uncertain. It also allows payment by installments, with a provision that upon default in the payment of any installment the whole sum shall become due.

9. "Deliver to order of A. B. 100 bushels of wheat" is nonnegotiable because not payable in money.

10. The instrument may specify a particular kind of money, as gold coin, silver dollars, greenbacks, or a foreign money, as Mexican silver dollars. There has been much conflict as to whether instruments payable in "current funds" are negotiable, since current funds may include the promissory notes of banks (i.e. bank notes), which are themselves merely negotiable instruments. If payable in any kind of legal-tender money there could be no question; but current funds include more than legal-tender money, and courts have differed as to whether that phrase is the equivalent of money.

3. It must be payable on demand or at a fixed or determinable future time.

Examples: 11. "On demand, pay, etc."; "At sight, pay, etc," are payable on demand. So also if no time for payment is expressed the instrument is payable on demand. Such instruments are due at once and become overdue after the expiration of a reasonable time.

12. "Thirty days after date"; "On or before Jan. 1, 1905"; "Within one year after my death"; these are all fixed or determinable dates. "When A. B. is twenty-one" is not, because A. B. may never reach that age. "Thirty days after sight, etc.," is determinable.

4. It must be payable to order or to bearer.

Examples: 13. "I promise to pay A. B. twenty dollars" is nonnegotiable.

14. "I promise to pay A. B. or order twenty dollars" is negotiable when indorsed by A. B.

15. "I promise to pay the bearer twenty dollars" is negotiable without any indorsement.

16. "I promise to pay cash twenty dollars" is payable to bearer.

17. If the payee is known by the maker to be a fictitious person, the instrument is payable to bearer.

18. When an instrument payable to the order of A. B. is indorsed in blank by A. B. it is then payable to bearer. An indorsement is in blank when A. B. simply writes his name upon the back of the instrument.

19. An instrument may be made payable to the order of the maker, or drawer, or drawee, or two or more persons jointly.

5. If the instrument is a bill of exchange, it must name or otherwise indicate the drawee with reasonable certainty.

Examples: 20. "To ——, Mobile, Alabama," is not a bill because the drawee is neither named nor indicated.

21. "To the owner of the steamer *Dorrance*" is sufficient because the drawee is indicated, though not named.

99. What a negotiable instrument must not contain. The rule and the exceptions upon this point may be stated as follows.

1. *Rule.* Subject to the exceptions enumerated below, a negotiable instrument must not contain a promise or an order to do any act in addition to the payment of money.

Examples: 1. "I promise to pay to the order of A. B. fifty dollars and also deliver to his order 100 bushels of wheat," is nonnegotiable.

2. "Pay to A. B. or order fifty dollars and also deliver to him my horse Billy B.," is nonnegotiable.

2. *Exceptions.* The exceptions to this rule are given below.

(*a*) The instrument may give the *holder* an election to require something to be done in lieu of the payment of money. In such case the maker promises the payment of money and has no election to do anything else. The holder may require the payment of the money, but he may if he chooses take something in place of it.

Example 3. "I promise to pay to the order of A. B. fifty dollars, or at his election deliver to him 100 bushels of wheat," is negotiable.

(*b*) The instrument may authorize the sale of collateral securities in case of nonpayment at maturity. The note given to a bank that lends money on collateral security usually contains a provision for the sale of the securities in case of default in payment.

(*c*) The instrument may authorize the confession of judgment upon nonpayment at maturity. Judgment notes are not used in some states, but where they are in use the Negotiable Instruments Law regards them as negotiable.

(*d*) The instrument may waive the benefit of any law intended for the advantage or protection of the maker unless such waiver is forbidden by the statute creating the exemption. In some states it is allowable to insert a clause waiving the benefits of homestead and exemption laws.

100. Nonessentials. There are certain things which may or may not appear in a negotiable instrument, and their presence or absence will not affect its negotiability.

1. *Statement of consideration.* A negotiable instrument need not state that any value was given. It is usual to insert the words "for value received," but this is not necessary to its validity, and the instrument has a presumptive consideration without the use of these or equivalent words. In some states there are special statutes requiring that the consideration shall be stated in negotiable instruments given for patent rights, and these statutes must be observed. An instrument is not rendered nonnegotiable merely because it states the consideration, as, for instance, if it reads, "In payment for one horse I promise to pay, etc."

2. *Date.* A negotiable instrument need not be dated. If it is issued undated, the true date, which is the date when issued, may be inserted by any holder. The insertion of a wrong date binds prior parties in favor of a holder who afterwards takes the instrument for value and without notice of the error. It is always best to date a negotiable instrument in order to avoid difficulties.

3. *Place.* A negotiable instrument need not state the place where it is drawn nor the place where it is payable. It is, of course, best to insert the place and the date, but these are not essentials.

4. *Effect of seal.* A sealed instrument is generally nonnegotiable, but the seal of a corporation or municipality is regarded as part of the signature and does not affect the negotiability of commercial paper or negotiable bonds. The Negotiable Instruments Law extends this doctrine to private seals; but this is probably limited to the case where there is merely a signature followed by a seal, and might not extend to a case where there is a full recital of the seal, as where the instrument reads, "In witness whereof, I have hereto affixed my hand and seal." Negotiable bonds are usually sealed.

101. Effect of blanks. If an instrument is issued with blanks, a person who takes it has notice that it is to be filled up, and is put upon inquiry as to how it is to be filled. Any holder may fill the blanks in accordance with the authority given; if he fills them in excess of that authority, he cannot recover upon

the instrument. But if he fills them in excess of the authority and then transfers the completed instrument to a holder for value and without notice, the prior parties are liable to such holder. It is better that one who puts out an incomplete instrument should suffer loss than that the innocent purchaser should suffer it. A space which the writing does not completely fill, as the space for the amount, is not a blank if *something* be written in it.

Examples: 1. A. B. indorses C. D.'s note with the amount left blank, and authorizes C. D. to fill it up for an amount necessary to renew another note then due; this amount is in fact $240. C. D. fills up the note for $1000 and discounts it at a bank which knows nothing of these facts. A. B. is liable to the bank as indorser for $1000.

2. A. B. draws and delivers to C. D. a check with the amount left blank, and authorizes C. D. to write in an amount not exceeding $100. C. D. writes in $500 and the bank pays the check. A. B. must suffer the loss.

3. A. B. draws and delivers to C. D. a check for $2 upon a printed form thus: "Two.....Dollars." C. D. writes in the word "hundred" and changes the figures to correspond: "Two hundred..... Dollars." The bank pays C. D. $200. This is alteration, not filling a blank. The loss is that of the bank, although some states say that A. B. may be estopped to set up the alteration if he has by his negligent manner of drawing the check "invited" alterations. The general rule is that the alteration destroys the instrument; but the Negotiable Instruments Law allows a holder in due course to recover upon it for the original amount, and under this law the bank could charge A. B.'s account with $2.

102. Delivery. Ordinarily a negotiable instrument must be delivered in order to be valid. As between immediate parties, such as maker and payee, indorser and indorsee, this rule is absolute; but as between a prior party, as maker, and a remote purchaser for value without notice, a valid delivery by the maker to the payee is conclusively presumed if the instrument was completed by the maker but not if it was incomplete.

Examples: 1. A. B. makes a promissory note payable to the order of C. D. and leaves it on his desk. C. D. takes possession of it without A. B.'s consent. C. D. cannot recover against A. B. because there was no delivery.

2. In the above case C. D. indorses the note and transfers it to E. F., who is a holder in due course. E. F. may recover against A. B. The case would be the same if A. B. locked the instrument in his desk or safe and C. D.

broke in and took it. It is especially dangerous to keep undelivered completed instruments payable to bearer, because any thief by getting possession of such an instrument could give good title to it.

3. If in the above case the instrument was incomplete in some respect, and it was stolen, completed by filling blanks, and negotiated, the maker would not be liable.

III. Negotiation

103. Negotiation; indorsement; delivery. Negotiation may be by indorsement and delivery, or by delivery alone, according as the instrument does or does not require an indorsement.

1. *Negotiation.* An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer, or if the last indorsement is in blank, it may be negotiated by delivery, the same as money. If payable to order, it is negotiated by the indorsement of the holder, followed by delivery. Indorsements are written on the back of the instrument. If that is filled, another strip called an "allonge" is attached and the indorsements are continued upon that.

2. *Indorsement.* Indorsements may be either special or in blank, and may be unqualified or qualified or restrictive.

(*a*) A special indorsement specifies the indorsee, as "Pay to E. F. A. B." This could not again be negotiated without E. F.'s indorsement.

(*b*) A blank indorsement specifies no indorsee. The indorser simply writes his name on the back of the instrument, and it then becomes payable to bearer. Any holder may, however, convert this into a special indorsement by writing "Pay to (his name)" over the blank indorsement.

(*c*) An unqualified or unrestricted indorsement places no restriction upon the further negotiation of the instrument or upon the indorser's liability. The indorsements given above are unqualified and unrestricted.

(*d*) A qualified indorsement simply passes title without rendering the indorser liable upon the paper. The form used for this purpose is "without recourse," written above the

indorser's name. This does not impair the negotiability of the paper; it simply exempts this indorser from liability upon it.

(*e*) A restrictive indorsement constitutes the indorsee an agent of the indorser — usually for the collection of the paper. The form commonly used is "Pay to E.F. for collection. A.B." Other forms are: "Pay to E.F. only. A.B."; "Pay to the X. Bank for deposit only." This indorsement is notice that A.B. owns the paper, and practically prohibits further negotiation except for collection purposes. The indorsee may receive payment or may transfer to another person who is to receive payment; but there cannot subsequently be a holder in due course free from the claims of A.B.

The indorser may waive presentment, notice, and protest by so specifying above his indorsement. The phrase "waiving protest" is ordinarily used for this purpose. This waives the conditions in his contract (see sec. 110).

A transfer without indorsement of paper payable to order is a mere assignment and not a negotiation. The transferee is entitled, however, to have the indorsement of the transferror, and negotiation takes effect from the time he secures it.

The last transferee or indorsee is the holder. He may be a "holder in due course" or "not a holder in due course," and his rights may depend upon his position in this respect.

Examples of Indorsements

[Refer to the promissory note on p. 174.]

Blank indorsement:	Robert H. Moore & Co.
Special indorsement:	Pay to order of John Spearing. Robert H. Moore & Co.
Qualified indorsement:	Without recourse. Robert H. Moore & Co. or Pay to John Spearing, without recourse. Robert H. Moore & Co.
Restrictive indorsement:	Pay to John Spearing for collection. Robert H. Moore & Co.

Waiving conditions: Waiving protest.
ROBERT H. MOORE & CO.
or
Pay to JOHN SPEARING, waiving protest.
ROBERT H. MOORE & CO.

The indorsee may indorse to another and he to another, and so on.

Successive indorsements: Pay to JOHN SPEARING.
ROBERT H. MOORE & CO.
Pay to RALPH LEAR.
JOHN SPEARING.
Pay to GOLDBERG & MORTON.
RALPH LEAR.
etc., etc., etc.

104. Holder in due course. A holder in due course is a holder who takes completed and regular paper before maturity in good faith and for value and without notice of any defects or defenses. He is often called a "*bona fide* holder for value without notice." The phrase "holder in due course" is used in the Negotiable Instruments Law. In order to be a holder in due course a transferee must take the instrument under the following conditions.

1. The instrument must be complete and regular upon its face.

Any blank, any erasure, any irregularity, indicates that the paper is not issued in the usual course of business, is not in conformity with business usage, and the holder is put upon inquiry by this fact. As to what appears upon the face of the paper the rule is *caveat emptor*, — let the buyer beware.

2. The instrument must not be overdue.

When the instrument is payable at a fixed time its due date is certain. A transfer on the day of maturity is before the instrument is overdue.

When an instrument is payable on demand it is due a reasonable time after its issue. What is a reasonable time is a question of fact to be determined by the nature of the instrument, the usages of trade, and the facts of the particular case. No case shows that more than three months can be allowed, and some cases have held three months to be too long; some states by statute specify what is to be regarded as a reasonable time

in the case of paper payable on demand. A promissory note payable on demand is due without regard to intermediate negotiations, but a bill of exchange payable on demand, if negotiated at reasonable intervals, is due within a reasonable time after the last negotiation.

3. The holder must take the instrument in good faith and for value.

Bad faith may be gathered from circumstances, as where an instrument to which the maker has a good personal defense is transferred for a sum so out of proportion to its face value as to raise a suspicion of collusion. Such grossly inadequate consideration may be evidence of bad faith and is to be considered in deciding that question of fact. Taking a note with an actual suspicion that there is some defect in the transferror's title is taking in bad faith even if full value be given.

Value is any consideration sufficient to support a common law contract. If the holder suffers any detriment in taking the instrument, he has furnished value. The disputed question has been whether the taking by C of a negotiable instrument made by A, and owned by B, as collateral security for an antecedent debt due from B to C, constitutes C a holder in due course. New York and some other states have held that it does not, while the United States Supreme Court and the courts of many states have held that it does. The Negotiable Instruments Law sought to adopt the rule that it does, but the language used was held by a New York court ineffective for this purpose. It is argued that C suffers no very real detriment in taking the instrument merely as security for an antecedent debt. If C took it as security for a contemporaneous debt, or in payment of a past debt, or as security for a binding extension of time upon the old debt, there would clearly be a detriment to C sufficient to constitute value.

Example 1. "New York City, Jan. 5, 1905. Three months after date I promise to pay to the order of B one hundred dollars, value received. A." On Feb. 10 B indorses and delivers the above instrument to C as collateral security for a prior debt he owed to C. When the note is due C sues A upon it and A sets up that B procured it by fraud. If C is a holder for

value (and without notice of the fraud), this defense is not good against him; otherwise it is good. Is he a holder for value? In New York and in several other states it is held that he is not, while in the federal courts and in many states it is held that he is. But if on February 10 C took the note in *payment* of a past debt, or as security for a debt then contracted, he would undoubtedly be a holder for value.

4. The holder must not at the time of the negotiation to him have notice of any infirmity in the instrument or defect in the title of his transferror.

Notice in the law of negotiable instruments means actual knowledge or knowledge of such facts as to constitute bad faith. It is the state of the holder's mind that is important. Negligence, even gross negligence, is not notice, although it may be evidence of bad faith. The question is not, Would an ordinarily prudent man in like circumstances have had notice or have had a suspicion of some defect? but, Did this holder have notice or have a suspicion?

The title of the transferror is defective when he obtains the instrument or any signature thereto by fraud, duress, or other unlawful means, or for an illegal consideration, or negotiates it in breach of faith or under circumstances amounting to fraud.

5. A holder who derives title through a holder in due course is himself a holder in due course, even though he does not comply with the above requirements.

Example 2. B procures from C a negotiable instrument by fraud. B negotiates it to D who is a holder in due course. D negotiates it to E, who has knowledge of the fraud (but is not a party to it). E is a holder in due course with all the rights of D. This rule protects D, the holder in due course, who otherwise might have the instrument locked up in his hands after knowledge of the fraud became general. But if D negotiated it back to B, the latter would not be a holder in due course, because he was a party to the fraud.

105. Rights of holder in due course. The following rules govern the rights of a holder in due course.

1. The holder in due course holds the instrument free from all personal defenses and may enforce payment for the full amount against all parties liable upon it; but he does not hold it free from the absolute defenses.

(*a*) Personal defenses are fraud, duress, illegality not made an absolute defense by statute, want of consideration, release of maker or other party, want of title in the transferror, etc.

Examples: 1. B purloins a negotiable instrument payable to bearer and negotiates it to C, a holder in due course. C may recover upon it and may hold it even against the true owner. It is in the latter respect on the same basis as stolen money.

2. B induces A by a false representation to buy a horse, and A gives B his promissory note for $100. B negotiates the note to C, a holder in due course. C may recover the full amount. A cannot set up B's fraud against C.

3. B gets A to make a promissory note without any consideration whatever. B negotiates it to C, a holder for value. C may recover from A upon it.

4. A anticipates the due date of his note and pays B in full, leaving the note in B's hands. Before it is due B negotiates it to C, a holder in due course. A must pay it again to C.

(*b*) Absolute defenses are forgery, alteration, infancy, illegality when made an absolute defense by statute, want of execution and delivery as and for a negotiable instrument, etc.

Examples: 5. A gives to B a negotiable instrument for a gambling debt. B negotiates it to C, a holder in due course. C cannot recover upon it in those states which by statute have made instruments given for gambling debts void. (The Negotiable Instruments Law has sought to change the rule as to such absolute defenses as statutory illegality in gambling, usury, etc., and some courts have given effect to it as substantially repealing the statutes making such instruments void; but at present it is unsafe to say that this will be the general result.)

6. A is asked by B to sign a lease. By a trick B substitutes a negotiable promissory note, which A signs, thinking it is the lease. B negotiates the note to C, a holder in due course. C cannot recover upon it unless he shows that A was so negligent as to work an estoppel. The defense is absolute unless A is estopped by his own negligence to set it up against an innocent holder. There was no execution and delivery as and for a negotiable note.

7. A gives to B a note for $10. B alters it to read $100 and negotiates it to C, a holder in due course. C cannot recover upon it. Alteration is an absolute defense. (The Negotiable Instruments Law has now provided that C may recover upon it according to its original tenor, namely, to the extent of $10.)

2. Every holder is deemed presumptively to be a holder in due course. But when fraud, duress, illegality, or defective title has been proved by way of defense, the holder must then show by proof that he gave value, and must show the circumstances under which he took the instrument.

Example 8. C, the holder, brings an action against A, the maker. C proves A's signature, introduces the note in evidence, and rests his case. This is all the proof necessary, as there is presumption of consideration and presumption that C is a holder in due course. But if A now proves that the note was obtained by B by fraud or for an illegal consideration, then C must prove the value he gave and establish good faith and want of notice by proving the circumstances under which he took the note.

IV. Maker's and Acceptor's Contract

106. Maker's contract on a promissory note. The maker of a promissory note contracts that he will pay it absolutely. No step is necessary to fix the maker's liability. The holder need not for this purpose seek the maker or present the note to him. If it is not paid at maturity, the holder may at once bring an action against the maker and recover from him.

Presentment to the maker at maturity is necessary to fix the liability of an indorser but not to fix the liability of the maker himself.

107. Acceptor's contract on a bill of exchange. An acceptor's contract is absolute. It may be upon the bill or in a separate instrument. Only the drawee can accept.

1. *The contract.* When the drawee of a bill of exchange accepts it by writing his name, usually with the word "Accepted," across the face of the bill, he thereby undertakes that he will pay the bill according to the terms of his acceptance. He also admits that the drawer's signature is genuine and cannot afterwards dispute that point. An acceptance may be general or qualified.

(*a*) If the acceptance is general and unqualified, the acceptor agrees to pay according to the tenor of the bill, that is, he assents fully to the order of the drawee. He is then liable like the maker of a promissory note.

(*b*) If the acceptance is qualified, the acceptor changes the tenor of the bill, that is, does not assent fully to the order of the drawer. An acceptance is qualified which makes payment depend upon any condition, or is for only a part of the amount specified, or changes the time of payment, or positively changes the place of payment. Changing the place of payment does not necessarily qualify the acceptance so long as the new place is not made the exclusive place of payment. "An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere." The holder may refuse to take a qualified acceptance and may protest the bill for nonacceptance. If he does take it, he releases the drawer and prior indorsers unless they also assent to it or after due notice of it fail to dissent.

Examples:

$500 NEW YORK, Feb. 27, 1905.

Thirty days after sight pay to the order of Foster McKinnon five hundred dollars, and charge to the account of

ALBERT HOWARD.

To JOHN DRURY,
Chicago.

1. "Accepted, March 6. JOHN DRURY." This is a general acceptance. The date of acceptance should be added to fix the due date, since the bill is payable not thirty days after date but thirty days after sight. It is due thirty days from March 6, namely, on April 5.

2. "Accepted, March 6, 1905, payable at the Franklin National Bank. JOHN DRURY." This is still a general acceptance, although it specifies a place of payment and to that extent qualifies the bill. Custom has permitted this.

3. "Accepted, March 6, 1905; payable at the Franklin National Bank only. JOHN DRURY." This is qualified. It positively changes the place of payment, which by the tenor of the bill would be at the drawee's place of business.

4. "Accepted, March 6, 1905, when in funds. JOHN DRURY." This is qualified. There is a condition which may never be fulfilled.

5. "Accepted, March 6, 1905, for $350. JOHN DRURY." This is qualified. It changes the amount.

6. "Accepted, March 6, 1905, payable April 15, 1905. JOHN DRURY." This is qualified. It changes the time of payment from thirty days after sight to forty days after sight.

If the holder takes acceptance 3, 4, 5, or 6, he releases the drawer from liability unless after due notice of the kind of acceptance the drawer fails within a reasonable time to dissent. If the holder will not take these acceptances, he must protest the bill and give the drawer due notice of dishonor.

2. *Acceptance by separate writing. Letter of credit.* The holder is entitled to have the drawee accept upon the bill itself, and may treat the bill as dishonored if he refuses to do so. But an acceptance on a separate sheet of paper is perfectly valid and binds the acceptor in favor of the holder and all who afterwards take the bill on the strength of such acceptance. Moreover, there may be a promise in writing to accept a bill or bills thereafter to be drawn, and this binds the acceptor in favor of all who take the bill or bills for value upon the faith of such a written promise. A "letter of credit" issued to travelers in order to enable them to obtain money in foreign cities is merely a banker's written promise to accept bills drawn upon him up to a certain amount.

Example. B, who is going abroad, buys of a New York banker a letter of credit for £200. The letter names B, often describes him, contains his signature, and says to foreign bankers that the New York bank will accept bills drawn upon it by B up to £200, if each bill refers to the New York bank's "letter of credit No. —." Each draft so cashed by a foreign bank is entered upon the letter of credit, so that the balance undrawn is always a simple matter of computation. The foreign banker compares B's signature on the draft with the signature on the letter and satisfies himself in all reasonable ways that the person drawing the bill is the person named in the letter. He then discounts the bill and forwards it to New York (or it may be by arrangement specified in the bill, to London), and the New York banker is bound to pay it because he has promised in advance to do so. It is customary for New York banks to agree that these bills shall be payable at some London bank, since London is the great financial clearing house for the whole world.

3. *Who may accept.* No one but the drawee named in the bill can accept it, but there are two exceptions to this rule. (*a*) A bill may refer to a secondary person to whom resort shall be had in case the bill is dishonored by the first drawee. Such a person is called a "referee in case of need." The usual form is to write below the drawee's name, "In case of

need apply to G. H." It is in the option of the holder to resort to the secondary person. (*b*) When the bill has been dishonored by the drawee any person can accept it for the honor of the drawer or a prior indorser. This acceptance is called "acceptance *supra protest* for honor." Such acceptor becomes liable to the holder upon condition that the bill be again presented to the drawee at maturity for payment, and if not paid, that it be protested and due notice given to the acceptor for honor.

108. Presentment of bill of exchange for acceptance. Presentment for acceptance is for the purpose of ascertaining whether the drawee intends to pay the bill when it is due. Presentment may be necessary or it may be optional with the holder.

1. *When necessary.* When a bill is payable after sight it must be presented for acceptance in order to fix its maturity. A failure so to present it within a reasonable time after it is issued, or after its last negotiation, would discharge the drawer and the indorsers. A bill payable at a day certain need not be presented for acceptance; it is enough to present it for payment when that day arrives. Such a bill may, however, be presented for acceptance before its maturity, if the holder wishes to do so. The drawee is allowed twenty-four hours to decide whether to accept; if he refuses to return the bill thereafter, he is deemed to have accepted.

2. *How and when.* Presentment to the drawee for acceptance must be by or on behalf of the holder at a reasonable hour of a business day. Presentment cannot be on holidays; if Saturday is not otherwise a holiday, presentment for acceptance (but not for payment) may be made before twelve o'clock noon of that day. Presentment of a bill naming two or more drawees must be made to all, unless they are partners, when presentment to one is sufficient. Presentment is excused if the drawee is dead or has absconded, or if after the exercise of reasonable diligence he cannot be found.

3. *Refusal to accept.* If the drawee refuses to accept the bill, or if presentment is excused, the bill is said to be dishonored. In such case the holder must give due notice of the fact to the

drawer and indorsers in order to hold them liable on the instrument; if he fails to do so, they are discharged. If the bill is a foreign bill, the holder must also have it protested, that is, presented by a notary public and certified by him as duly presented and dishonored.

4. *Effect of acceptance.* If the drawee accepts the bill, the holder retains it until maturity or negotiates it, and then he or the new holder presents it again for payment. If it is not then paid, the bill is dishonored and must be protested and due notice given to the drawer and indorsers. A failure to take these steps discharges the drawer and prior indorsers.

V. Drawer's and Indorser's Contract

109. Drawer's contract on a bill of exchange. The drawer's contract is conditional. He undertakes that he will pay the bill on these conditions: (*a*) that it be duly presented to the drawee for acceptance or payment as the case may be; (*b*) if it be dishonored, that due notice of that fact be given to him; (*c*) if a foreign bill be dishonored, that it be also duly protested.

These conditions are strict, and in order to hold a drawer they must be strictly complied with unless a recognized excuse be shown for not doing so. The steps necessary to fulfill these conditions are treated in secs. 111–113 *post.*

110. Indorser's contract on a bill or note. The indorser's contract is both a contract of assurance of payment and a contract of warranty. One who negotiates without indorsement also gives certain implied warranties.

1. *Contract to pay.* An indorser by an unqualified indorsement contracts that he will pay the bill or note upon these conditions: (*a*) that it be duly presented to the acceptor or maker for payment, or, if necessary, to the drawee for acceptance; (*b*) if it be dishonored, that he be given due notice of that fact; (*c*) if it be a foreign bill, that it be duly protested. A qualified indorser ("without recourse") does not undertake any contract to pay, but he does undertake a contract of warranty.

2. *Contract of warranty.* The indorser in transferring negotiable paper also impliedly warrants (*a*) that the instrument is genuine and in all respects what it purports to be; (*b*) that he has good title to it; (*c*) that all prior parties had capacity to contract; (*d*) that the instrument at the time of his indorsement is valid and subsisting. An indorser by qualified indorsement, or a transferror by delivery alone, impliedly makes the same or substantially the same warranties. The sale of a negotiable instrument is in some respects like the sale of a chattel and has warranties accompanying the sale.

Examples: 1. B by delivery without any indorsement sells to C a note of A payable to bearer. Unknown to either party A's name is forged. C may maintain an action against B for breach of the implied warranty of genuineness. The same result would follow if B had indorsed "without recourse" or had made an unqualified indorsement. In the latter case, however, he would have been sued upon his contract to pay.

2. In the above case, instead of forgery A pleads infancy and escapes liability. B is liable to C for breach of the warranty that prior parties had capacity to contract. So also if A pleads that the note was given for a gambling debt and thus escapes liability, B is liable for breach of the warranty that it is valid. The Negotiable Instruments Law, however, makes a seller by delivery or by qualified indorsement liable in such case only if he knows the instrument is invalid.

3. *Order of indorsers' liability.* If there are several indorsers upon a negotiable instrument, they are, as among themselves, presumptively liable in the order in which they indorse; but it may be shown by proof that they agreed otherwise.

Examples: 3. A note made by X payable to A is indorsed A, B, C, D, and is in the hands of E. E presents the note at maturity to X, who refuses payment, and E notifies each indorser. E may sue any one of them. Suppose he recovers from C. C may then recover from either A or B, but not from D, because had D paid he could have recovered from the prior indorsers of whom C is one. If C recovers from B, B may then recover from A. The only recourse of A is against X, the maker.

4. If A, B, C, and D are shown by proof to have agreed to become joint indorsers, then if C paid E, C could recover one fourth of the payment against A, B, and D respectively.

4. *Irregular indorser.* An irregular indorser is one who indorses before the payee, and generally to lend his credit to

the maker, although it may be to lend his credit to the payee. If an instrument is made by X payable to the order of A. B., we expect to see A. B.'s indorsement first in the list; if we find E. F.'s first, we call E. F. an irregular indorser. Under the Negotiable Instruments Law the rule is that if E. F. indorses in blank before delivery to A. B. he is liable to A. B. as indorser; but if he indorses to accommodate A. B. he is not liable to A. B. although he is to subsequent holders. Some states hold E. F. a co-maker, and some hold him a guarantor for the maker; but the prevailing rule is that stated.

5. *Accommodation indorser.* An accommodation indorser is one who indorses in order to lend his credit to another party to the instrument. The simplest case is where C. D. wishes to borrow money at a bank and asks A. B. to lend his credit. In such case C. D. makes a promissory note payable to A. B.'s order, A. B. indorses it in blank, and C. D. discounts it at the bank. Had A. B. been the ordinary payee, he would have owned the note and discounted it himself. Suppose A. B. had owned it but the bank would not discount it on A. B.'s and C. D.'s credit. A. B. asks E. F. to lend his credit. A. B. indorses the note in blank, E. F. then indorses it in blank, and A. B. discounts. E. F. is the accommodation indorser for A. B., the payee. If E. F.'s signature appears before that of A. B., he is called an "irregular indorser."

6. *Guarantor.* A guarantor is one who writes a guaranty upon the back of a negotiable instrument instead of an ordinary indorsement. His contract is to pay if the maker or other prior party does not, without any condition as to presentment or notice. There has been some question whether such a guaranty is negotiable, that is, whether it will pass to new holders upon the negotiation of the paper. It is generally held not to be negotiable, but when a negotiable instrument with a general guaranty written upon it is negotiated there is also an implied assignment of the guaranty to the new holder.

Example 5. X makes a negotiable note payable to the order of A. B., who writes upon the back, "For value received, I hereby guaranty the payment of the within note. A. B.," and delivers the note to C. D. The latter

indorses it, "Pay to E. F. C. D," and delivers it to E. F. At maturity E. F. presents it to X, who refuses payment. No notice is given to A. B. *Held:* (in some jurisdictions) that the guaranty passed by implied assignment with the negotiation of the note to E. F., and E. F. may recover upon it as assignee of C. D., and no notice to A. B. is necessary. Other jurisdictions hold that the guaranty was to C. D. and did not pass to E. F. upon negotiation. The better way for C. D. is to take an indorsement by A. B. and avoid these questions. If C. D. wishes to escape the risks of presentment and notice, he should have A. B. indorse "waiving protest."

111. Presentment for payment. The first condition in the drawer's and the indorser's contract is that there shall be due presentment upon the maker or acceptor for payment. Unless this condition is met the drawer or indorser will be discharged from all liability, except in case he waives the condition or some allowable excuse be shown for not fulfilling it. We have therefore to consider how and when presentment is to be made in order to fulfill this condition.

1. *Time of presentment.* If the instrument is payable at a fixed time, presentment must be made on the day fixed.[1] If this falls on Sunday or a holiday, the instrument is payable on the next succeeding business day. If the due day falls on Saturday, the Negotiable Instruments Law provides that the instrument is to be presented the next Monday unless that is a holiday.

If the instrument is payable on demand, presentment must be made within a reasonable time after its issue or, in case of bills (not checks), a reasonable time after the last negotiation. Demand instruments may be presented on Saturday up to twelve o'clock noon, unless it happens to be wholly a holiday.

Presentment must be at a reasonable hour on a business day. This ordinarily means business hours, but presentment at a residence at a later hour may be justified by circumstances.

In computing time a month is a calendar month. Thus a note dated January 30, due one month from date, is due February 28, or in leap year, February 29. If dated of February 28 and due in one month, it would be due on March 28. In computing days the actual time is taken. A note

[1] If days of grace are allowed, three days must be added before the presentment can be made. We shall assume that days of grace are abolished.

dated October 13 and due in ninety days is due January 11. If the due date so fixed is a holiday, the next business day is taken as the due date. The day of the date is excluded in both cases. A note dated January 1 and due one month from date is not due January 31 but February 1. A note dated January 1 and due thirty days from date is due January 31, not January 30.

2. *Place of presentment.* Where a place of payment is specified in the instrument, presentment must be at that place. Where no place is specified the place of business of the maker or acceptor is understood, or, failing that, his residence. If neither can be found, then presentment may be made to the maker or the acceptor wherever he may be, or at his last known place of business or residence.

Example 1. A note is made "payable at the X Bank." Presentment must be made at the bank. Presentment at the maker's place of business would be ineffective. The note is equivalent to an order by the maker to the bank to pay the same and charge against his deposit. If the note is deposited in the bank by the holder and is there on the day of maturity, presentment is complete.

3. *Mode of presentment.* The instrument must be exhibited to the maker or acceptor (or drawee) and payment demanded; if it is paid, it must be delivered up. If it is secured by collateral, this also must be delivered up.

4. *To whom presented.* Presentment of a note is made to the maker or, if he is absent from the place or inaccessible, to any person found in charge of his place of business. Presentment of a bill is made to the drawee for acceptance or to the acceptor for payment in the same way. If the maker or acceptor is dead, presentment may be made to his personal representative (executor or administrator). If an instrument is made by partners, presentment to one is sufficient; but if made by joint parties who are not partners, presentment must be to all of them before the instrument can be deemed to be dishonored.

5. *Excuse for delay.* If circumstances beyond the control of the holder cause a delay in presentment beyond the day of maturity, this delay will be excused if presentment is made with reasonable diligence after the cause of delay ceases to operate.

Example 2. H in New York holds a note of M payable in Chicago. He forwards it by mail in due season to his agent in Chicago. The mail train is wrecked and the mail is delayed until the day of maturity is past. The note arrives in Chicago two days after maturity and is promptly presented. The presentment is sufficient, as the delay is excused.

6. *Presentment dispensed with.* If after due diligence the holder cannot make any presentment upon the maker or acceptor, presentment is dispensed with. Such would be the case if the maker could not be found in any place of business or residence. Due diligence requires that the holder should make proper inquiries as to the residence of the maker.

7. *Waiver of presentment.* The indorser may waive presentment. This is often done by writing above his indorsement the words "waiving presentment" or "waiving protest." But the waiver may be oral and may be made at any time. A promise to pay after he is discharged for nonpresentment, if made with knowledge of the fact, will constitute a waiver.

8. *Effect of dishonor.* If the instrument after presentment to the maker or acceptor (or drawee) is dishonored by nonpayment (or nonacceptance), the first condition in the drawer's or indorser's contract has been fulfilled. It then remains for the holder to take the next step and give due notice of the fact and, in case of a foreign bill, have due protest made.

9. *Payment for honor.* Where a bill has been protested for nonpayment, any person may intervene and pay it *supra protest* for the honor of any person liable thereon. This must be attested by a notarial act of honor founded upon the declaration of the payer as to his intention to pay the bill for the honor of the person specified. The payer then pays the holder and takes the bill. All parties subsequent to the one for whose honor he paid are discharged, but that person and all prior persons are liable to the payer for honor.

112. Notice of dishonor. The second condition in the drawer's or indorser's contract is that due notice shall be given him that the primary party has dishonored the instrument by refusing to pay it or it may be in the case of a bill by refusing to accept it. Failure to give such notice will discharge the drawer or

indorser unless he has waived notice or unless some allowable excuse is shown for not giving it. We must therefore consider what constitutes due notice.

1. *By whom given.* The holder may give the notice, or his agent may give it, or a notary employed by him may give it. A notary is employed to present the instrument whenever it is intended to protest it, and the notary may give the required notice also.

In addition, any party who by getting notice is himself liable to the holder may give notice to a prior party who would be liable to him.

Example 1. X is the maker; A, B, C, D are indorsers; and H is holder, of a note. H presents the note to X, who refuses payment. H gives notice of dishonor to C; C gives notice of dishonor to B; and B gives notice to A. The liability of A, B, and C is fixed. But C could not give notice to D, because if C paid H, C could not recover from D. The notice by each indorser to his prior indorser inures to the benefit of the holder, who could sue A or B or C, as he might choose. Of course H might have given notice to all four had he wished. The holder may choose which of the indorsers he will give notice to; each indorser so notified should make sure that his prior indorsers have also been notified, or should notify them himself.

2. *Form.* The notice may be written or oral. It is sufficient if it identifies the instrument and indicates that it has been dishonored by nonacceptance or nonpayment. The notice may be delivered personally or it may be sent by mail. When notice of dishonor is in due time properly addressed and stamped and deposited in the post office or regular letter box, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

3. *Time allowed.* If the person giving and the person receiving the notice reside in the same place, personal notice must be given at a reasonable hour of the day of dishonor or of the day following, and a notice by mail must be deposited in the post office in time to reach the addressee in the usual course not later than the day following.

If the person giving and the person receiving the notice reside in different places, the notice should be deposited in the

post office in time to go out by a mail not later than the day following the day of dishonor, or if there be no mail at a convenient hour of that day, by the next mail thereafter. Notice in this case might also be personal, but it must be so given as to reach the drawer or indorser as soon as if sent by mail.

Where the holder gives notice to an indorser, the indorser has, after receipt of such notice, the same time for giving notice to a prior indorser.

Example 2. The holder, H, resides in New York; the third indorser, C, resides in Chicago; the second indorser, B, in San Francisco; the first indorser, A, in New York. H on April 1 presents the note and it is dishonored; on April 2 H mails notice to C which is received by him in Chicago on April 4; on April 5 C mails notice to B which is received by him in San Francisco on April 9; on April 10 B mails notice to A which is received by him in New York on April 16. Each notice is duly given and the liability of all indorsers is fixed. If H had notified A, the notice would have been received by A on April 2.

4. *Place.* If the drawer or indorser has added an address to his signature, notice of dishonor must be sent to that address. If he has not added an address, then notice must be sent either to the post office where he is accustomed to receive his letters or to the post office nearest to his place of residence. If he lives in one place and has a place of business in another, notice may be sent to either place. If he is sojourning in another place, notice may be sent to that place. If notice is actually received within the time allowed, it will be good, though it may have been sent to the wrong place.

Examples: 3. The indorser lives in Boston but is a senator and sojourning at Washington. Notice may be sent either to Boston or to Washington. A mere temporary, indefinite visit may not amount to sojourning.

4. The indorser lives in Montclair, N.J., and has a place of business in New York City. Notice may be sent to either place.

5. The indorser has a city residence in New York City and a summer residence at Stockbridge, Mass. Notice should ordinarily be sent to New York City, but may be sent to Stockbridge if the indorser is sojourning there.

5. *Waiver of notice.* Notice may be waived by drawer or indorser. It may be waived orally or in writing, and either before or after the time for it has arrived. The usual method

is to write "waiving notice" or "waiving protest" above the indorsement. The phrase "waiving protest" is construed to cover all steps, — presentment, notice, and protest, — but "waiving notice" does not dispense with presentment or protest. The indorsement "waiving protest" makes the indorser essentially a guarantor.

6. *When notice is excused.* Notice is excused when after the exercise of due diligence it cannot be given or when in the case of notice by mail it does not reach the addressee. Due diligence requires that suitable inquiries should be made to ascertain the indorser's address. Merely looking in a directory is not enough. Notice need not be given to a drawer who has no right to expect that the drawee would accept or pay the bill, as where he draws upon one who has no funds of his and has made no agreement, express or implied, to honor his bills. Notice need not be given to an indorser for whose accommodation the instrument was made or accepted.

Example 6. A promissory note is made by X payable to the order of B and is indorsed by B and discounted by B. X signed the note as accommodation to B merely, that is, loaned B his credit to raise money. In such a case B is not entitled to notice of nonpayment because it is B's duty to provide for payment, and not X's.

7. *Effect of failure to give notice.* If a bill be presented for acceptance and acceptance is refused, a failure to give the drawer and indorsers (if any) notice of this fact will discharge the drawer and indorsers as to this holder. The bill, however, is not yet due, and it is therefore possible for the holder to negotiate it to a holder in due course who does not know that it has been dishonored; as to such a holder the drawer and indorsers are not discharged.

If a bill or note is presented for payment and is dishonored, the failure to give notice will discharge the drawer or indorsers as to this holder and all subsequent holders, because as the bill or note is now due there can be no negotiation to a holder in due course, unless, indeed, it be at a later hour on the same day of maturity.

If a bill has been dishonored by nonacceptance and due notice given, and it is afterwards presented for payment and dishonored, no further notice need be given, unless in case the bill was in the meantime accepted.

If a bill has been dishonored by nonacceptance and no notice given, and it is afterwards negotiated to a holder in due course, the latter must present it for acceptance or payment and upon dishonor give due notice.

113. Protest. Protest is a solemn declaration by a notary in behalf of the holder against any loss to be sustained by the holder in consequence of the nonacceptance or nonpayment of a bill or note. The word "protest" signifies "to testify before," and a protest is therefore testimony before or in the presence of the notary that the instrument has been presented, demand for acceptance or payment made, such demand refused, and the instrument dishonored, followed by a formal declaration or "protest" that any loss arising therefrom shall be borne by the drawer or indorsers and not by the holder. In practice the notary must himself make the presentment and demand in order that he may have this evidence of dishonor; he cannot, unless statutes so provide, take the word of the holder or any other person as to these facts, or protest an instrument on hearsay evidence. In case a notary cannot be found to make such protest, it may be made by any respectable citizen of the place where the dishonor occurs, in the presence of two or more credible witnesses.

Protest *must* be made in the case of foreign bills of exchange, for in such cases the notary's certificate is the only admissible evidence of presentment, demand, and dishonor. Protest *may* be made in the case of other negotiable instruments and the notary's certificate used as evidence, but protest is not necessary, and the fact of dishonor may be proved by the oral evidence of the person making presentment and demand. It is now usual to protest all negotiable instruments, particularly those payable at a bank. In most banks some clerk is a notary, and if at the close of business hours his examination of the books shows that the maker of the instrument has not funds there to pay it, he protests the instrument.

The notary also usually gives the necessary notice of dishonor to the drawer or indorsers, but this may be done by the holder or by any other agent of his. If the notary gives such notices, he may include a statement to that effect in his certificate. Practice in that respect varies. If the statement that notices have been duly given is not included in the certificate, that fact would have to be proved at a trial by the oral evidence of the notary or other person who gave them.

CERTIFICATE OF PROTEST

United States of America, }
State of New York } ss.

BE IT KNOWN, *That on the* 27th *day of* April *in the year of our Lord, One Thousand Nine hundred* five, *at the request of* **First National Bank of Ithaca, N. Y.,** *I, BENJAMIN L. JOHNSON, Notary Public duly Commissioned and Sworn, dwelling in the City of ITHACA, County of Tompkins, and State aforesaid, did present the original* note *of* Donald Malcolm *for* Five hundred ——— *Dollars, hereunto annexed, at the* First Nat. Bk — Ithaca *where the same is payable, and demanded* payment *which was refused.*

WHEREUPON, *I, the said Notary, at the request aforesaid, did* **protest,** *and by these presents do publicly and solemnly protest, as well against the Maker and Endorser of the said* note *as against all others whom it doth or may concern, for exchange or re-exchange, and all costs, charges, damages and interest, already incurred, and to be incurred for want of* payment *of the same.*

And I, the said Notary, do hereby certify, that on the same day and year above written, due notices of the foregoing Protest, were put into the Post Office at Ithaca, postage paid, or served as follows:

Notice Harold Williamson directed Elmira, N.Y.
do Frank Whitson do 7 Allen St., Buffalo, N.Y.
do George Francis do 9 Eddy St., Ithaca, N.Y.

Each of the above named places being the reputed place of residence of the person to whom the notice was directed.

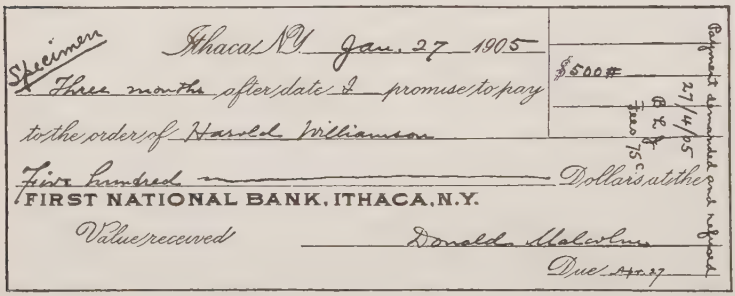
IN WITNESS WHEREOF, *I have hereunto subscribed my name and affixed my Seal of Office.*

{Notary's Seal}

Benj. L. Johnson.
Notary Public.

When protest has been made the notary prepares a certificate under his hand and seal setting forth (*a*) the time and place of presentment; (*b*) the fact that presentment was made and the manner thereof; (*c*) the demand made and the answer given, or the fact that the drawee, acceptor, or maker could not be found; (*d*) the cause or reason for protesting the instrument. This certificate is annexed to the instrument protested or a copy thereof, and is handed to the holder of the instrument as his evidence of presentment, demand, and dishonor. It may also, of course, contain evidence that notices were duly sent to the drawer or indorsers.

PROTESTED PROMISSORY NOTE



The protest must be at the place where the instrument is dishonored and on the day of the dishonor. But it is not essential that the certificate should be made on that day. Protest itself may be sufficiently indicated by a "noting" on the bill or note in very brief form, thus: "Payment demanded and refused, 27 April, 1905. B. L. J. Fees 75¢." This means that on that date the notary whose initials are written made due presentment and demand, that the instrument was dishonored and protested, and that the notary's charges are 75 cents. The notary may at any subsequent date "extend" the protest by making out his formal certificate.

The costs of protest are added to the amount to be paid by any party liable on the instrument. These fees are fixed by statute and include so much for protest and so much for each notice of

NOTICE OF DISHONOR

Ithaca, N. Y. Apr. 27 1905

SIR—

TAKE NOTICE, that a note

made by Donald Malcolm

For $500 #

Dated Jan. 27, 1905

Payable three months after date,

at the First NATIONAL BANK, of Ithaca,

and endorsed by you, was this day PROTESTED for non-payment and that the holders look to you for the payment thereof, payment having been demanded and refused.

Yours respectfully,

Benj. L. Johnson,
Notary Public.

To Harold Williamson.

dishonor. There is also added interest from the time the instrument was due until the drawer or prior party pays it to the holder.

In case of a foreign bill the holder may recover the cost of reëxchange. This is measured by the sum for which a sight draft must be drawn on the drawer of the dishonored bill in order to realize immediately the amount of the dishonored bill plus the cost of protest.

Example. D in London draws a bill for $1000 on E in New York and it is transferred to H in New York, who presents it for payment. It is dishonored and the protest fees amount to $1.25. It is obvious that D now owes H on that day $1001.25. H may draw a sight draft on D for such a sum as at the ruling rate of exchange between New York and London will realize in New York $1001.25. The difference between that sum (say $1081.35 American money) and the sum realized ($1001.25) is the cost of reëxchange which must be borne by D.

In the United States the matter of reëxchange has been simplified by statutes which fix a definite percentage on a foreign bill to be recovered in lieu of reëxchange. This varies in different states, but the amount is from 10 per cent upward.

114. Checks. The contract of the drawer of a check is different from that of the drawer of an ordinary bill of exchange so far as concerns presentment and acceptance.

1. *Presentment.* A check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon *to the extent of the loss caused by the delay.* If he is not damaged at all, he will not be discharged, no matter how long the delay.

Example. B draws a check for $100 and delivers it to C, who keeps it six months. In the meantime the bank fails. When it failed B had more than $100 on deposit. The bank pays 40% to depositors. C may recover from B $40 on the check, but not the other $60 because B is damaged by C's delay to that extent. Had this been a bill of exchange payable on demand, B would have been discharged altogether by C's unreasonable delay.

A reasonable time for the presentment of a check is much shorter than that for the presentment of a bill and cannot be prolonged by negotiation. If the holder and the bank are in the same place, the check should be presented before the close of banking hours on the next business day following the day of its issue. If the holder resides in a different place, the check should be started by a reasonably direct route to the place where the bank is located not later than the day following its delivery. The sending of checks by indirect routes through various correspondent banks has been held in some states to constitute unreasonable delay in presentment.

2. *Certification.* If the holder of a check procures it to be certified, the drawer and indorsers (if any) are discharged from

further liability. This is because when a holder takes the check to the bank to be certified he is entitled to the money and elects to take the promise of the bank in place of it. But if the drawer procures it to be certified before delivery to the payee, the latter takes the check with the same effect as an accepted bill of exchange. When a check is certified the bank immediately charges up the check to the depositor's account so as to preserve a fund from which to pay the check.

3. *Rights of holder of check.* A holder of an uncertified check has, ordinarily, no rights against the bank upon which it is drawn, even though the drawer has funds enough there to pay it. The promise of a bank to honor the checks of a depositor runs to the depositor only, and the payee of the check cannot sue the bank any more than the payee of a bill of exchange can sue the drawee before acceptance. The sole right of the payee is to present the check promptly and, in case it is dishonored, give the drawer due notice, and thereafter sue the drawer. In Illinois, Nebraska, and one or two other states, a payee is permitted to maintain an action against the bank if the drawer had funds enough to meet the check; the theory in those states is that drawing a check is an assignment to the payee of the sum named.

4. *Rights of drawer against bank.* If a bank wrongfully dishonors a depositor's check, the depositor has an action against the bank for the injury to his credit. If he is a business man, the damage to credit is presumed to follow such dishonor, and he may recover a substantial sum in the discretion of the jury.

115. Position of indorser after liability is fixed. After the necessary steps have been taken to fix an indorser's liability — or without such steps if he has waived them — the indorser's position is essentially that of a guarantor. His rights and remedies are those already discussed under the head of Guaranty (see secs. 91–93 *ante*).

If an indorser pays an instrument upon which he is liable, he is entitled to the possession of the instrument and may proceed upon it against all prior parties. He may strike out his own and all subsequent indorsements, and again transfer the paper if he wishes.

REVIEW QUESTIONS AND PROBLEMS

SECTION 94. In what sense is a negotiable instrument an instrument of credit? In what sense an instrument of trade? Illustrate methods of payment. What are the principal kinds of negotiable instruments? Explain the use of a bill of exchange. Distinguish inland and foreign bills. Is a check a bill of exchange? Name different kinds of promissory notes. Are bills of lading and warehouse receipts negotiable?

95. What are the three characteristics of negotiable instruments? Explain each. Are there three days of grace in your state? What distinguishes negotiation from assignment? Illustrate.

96. Define bill of exchange. Name the parties in a bill of exchange. What is acceptance? How is a bill transferred? What is a bill in a set? What two different purposes does a bill in a set serve? Define promissory note. What is the effect of stating a place of payment? Is it necessary? Explain discount. What is a certificate of deposit? What is a check? What is a certified check? What is a cashier's check and what is it used for? What is a cashier's bill of exchange? What is a bond? When is it negotiable? What is a coupon bond?

97. What is the Negotiable Instruments Law? Where is it in force? What is its effect?

98. State the five essentials of a negotiable instrument. How should a negotiable instrument be signed by A.B. who is agent for C.D. or who is treasurer of the X.Y. corporation?

Problem 1. A promissory note is signed "A.B., President.; C.D., Treasurer." It reads, "We promise to pay, etc." Across the end is printed, "X. Y. Co." The note has been transferred to a holder in due course, who sues A.B and C.D. personally. They set up that it is the note of the X. Y. Co. Result?

Problem 2. "I, A.B., promise to pay to the order of C.D. one hundred dollars on July 1." Action is brought against A.B. upon a promissory note. Result?

Problem 3. A check on a savings bank reads: "X.Y. Savings Bank. Pay to A.B. or order one hundred dollars and charge to my account, No. 25. C.D." Underneath is printed, "The bank book of the depositor must accompany this order." Is this negotiable?

Problem 4. "I promise to pay to the order of A. B. one hundred dollars and also one half the net profits of the sale of our crop of oats. C.D." Is this negotiable?

Problem 5. "I promise to pay to the order of A.B. one hundred dollars on July 1, with interest at 6%, or 10% if not paid at maturity, and with costs of collection if not paid at maturity. C.D." Is this negotiable?

Problem 6. "I promise to pay to the order of A. B. one thousand dollars within one year after he is married. C. D." Is this negotiable?

Problem 7. "I promise to pay to the order of A. B. five hundred dollars ninety days after the dissolution of the partnership between him and me. C. D." Is this negotiable?

Problem 8. B's clerk made out checks to fictitious persons and B signed them thinking they were for persons who had dealings with his concern. The clerk indorsed the fictitious names, obtained the money, and absconded. The bank charged the checks to B's account. B claims they should not be charged to him and that the bank should stand the loss. Which is right?

99. What must a negotiable instrument not contain? State the exceptions to this rule.

Problem 9. "I promise to pay to A. B. or order one hundred dollars, or at my election deliver to him one share of stock in the X. Y. Co. C. D." Is this negotiable?

100. Need a negotiable instrument state the consideration? Why? What is the effect of issuing a negotiable instrument undated? without a place of issue or payment? What is the effect of adding a seal?

101. When a note is issued with blanks state what may be done as to filling them. How if it is issued without a blank but with a partly filled space?

Problem 10. A note made by X and indorsed by A is issued June 10, but without any date expressed, and is payable "one month after date." It is transferred to B, who inserts the date June 1 and transfers it to C. It is presented July 1, and on dishonor due notice is given to A and B. Are they liable?

102. Is delivery necessary? When is it conclusively presumed? When not? Illustrate.

Problem 11. C. D. writes his name on a blank piece of paper to verify his signature. A. B. writes above the signature a promissory note for fifty dollars payable to his order, indorses it, and transfers it to E. F., who is a *bona fide* holder for value. Is C. D. liable to E. F.?

103. What is negotiation? How is it accomplished? What is a blank indorsement? a special indorsement? an unqualified indorsement? a qualified indorsement? a restrictive indorsement? an indorsement waiving conditions? When is a transfer a mere assignment? Who is the "holder"?

Problem 12. A note is payable to the order of A. B., who transfers it to E. F. without any indorsement. What is the position of E. F.?

Problem 13. A note payable to A. B. or order is indorsed, "Pay to E. F. for collection. A. B." E. F. then indorses it, "Pay to G. H. E. F." G. H. collects the money from the maker. Whose money is it?

Problem 14. A note payable to the order of A. B. is indorsed, "Without recourse. A. B.," and transferred to E. F. The maker is insolvent, and after due presentment to the maker and notice to A. B., E. F. sues A. B. Result?

104. Who is a holder in due course? State essentials. When is an instrument payable on demand overdue? What is bad faith? What is value? When is an antecedent debt value? What is notice of defenses or defects? State a case where a holder with notice is a holder in due course.

Problem 15. A note payable to order of A. B. on demand is transferred by him to E. F. six months after it was first issued. E. F. sues the maker, who sets up failure of consideration, a defense good against A. B. Is it good against E. F.?

105. What defenses are not good against a holder in due course? What are good? Illustrate. What presumption in favor of a holder? How is it overcome, and what then must the holder show?

Problem 16. C. D. in New York gives A. B. a note payable to his order for $100 upon A. B.'s false representation that he has worked two months for C. D. upon the latter's Kansas farm. In fact A. B. has never worked for C. D. at all. A. B. at once indorses the note for value to E. F., who does not know the above facts. Is C. D. liable to E. F. on the note?

Problem 17. C. D. borrows $100 of A. B., gives him a negotiable note for $100 at 6% interest and also a bonus of $5. A. B. before maturity transfers the note to E. F. for value and without notice. Is C. D. liable to E. F. on the note?

106. State the maker's contract. Is it absolute or conditional? When is presentment to the maker at maturity necessary? When not?

Problem 18. A note is payable "on demand at the X Bank." Is it necessary to present it at the X Bank before bringing an action against the maker?

107. What is the acceptor's contract? What does he admit? What is a general acceptance? What is a qualified acceptance? Must the holder take it? Result of taking it? Effect of specifying a place of payment? Effect of acceptance on separate paper? Must the holder take such acceptance? What is a letter of credit? Who may accept bills? State exceptions.

Problem 19. "To C. D.: Pay to order of A. B. one hundred dollars ten days after sight. E. F." A. B. indorses to G. H., who presents it to C. D. The latter writes, "Accepted, April 4, 1905. C. D." G. H. sues C. D. The latter sets up that A. B. forged E. F.'s signature. Is this a good defense against G. H., who is a holder in due course?

Problem 20. The drawee accepts a bill as follows: "Payable when in funds. C. D." The holder presents it for payment at maturity and the acceptor refuses to pay. Due notice is given the drawer. Is the acceptor liable to the holder? Is the drawer?

108. In what cases must a bill be presented for acceptance? When is it optional? Effect if drawee keeps and refuses to return the bill? On what days may presentment for acceptance be made? When is it excused? If drawee refused to accept, what should the holder do? What results if he does not take these steps? What results if the bill is accepted?

Problem 21. A bill payable ten days after sight is issued Jan. 8, 1904, is indorsed to A February 6, and is presented to the drawee for acceptance August 5. The drawee refuses to accept. A protests the bill and duly notifies the drawer. Is the drawer liable to A?

109. What is the drawer's contract? State the conditions. Effect of failure to fulfill them?

110. What is an indorser's contract as to payment? What warranties does he make? What is the order of the indorsers' liability? Who is an irregular indorser? What is his contract? Who is an accommodation indorser? Illustrate. Who is a guarantor? Is the guaranty negotiable?

111. When is a presentment for payment made? How is time computed? What if the due date falls on a holiday? on Saturday? When is an instrument payable on demand due? At what place must presentment for payment be made? State the mode of presentment. To whom is presentment made? What will excuse delay in presentment? When is it excused altogether? What is waiver? If the instrument is dishonored what is the effect? What is payment for honor?

Problem 22. A note falls due on Saturday. The holder presents it to the maker on that day. It is not paid. The holder duly notifies the indorser. Is the indorser now liable to the holder?

Problem 23. A note is payable at "114 South Main Street, St. Louis." It is presented at another place of business of the maker in St. Louis, and on dishonor due notice is given to the indorser. Is the indorser's liability fixed?

112. By whom must notice of dishonor be given? Illustrate. What should the notice contain? Must it be written? If written, how may it be delivered? Within what time must it be given when the holder and the indorser live in the same place? when they live in different places? If an indorser receives notice, what may he do? To what place should notice be sent? What is waiver? When is notice excused? What is "due diligence"? What is the effect of failure to give due notice? Suppose a bill dishonored for nonacceptance and no notice to drawer or prior indorser, are the drawer and indorser absolutely discharged?

Problem 24. A note made by X is indorsed by A, B, C, and D, and is in the hands of E. E presents it to X and it is dishonored. E gives due notice to D, who then gives due notice to B, and the latter to A and C. Who are liable to E?

113. What is protest? By whom made? When is protest necessary? When allowable? What is the evidence of it? How must the certificate be made and what must it contain? What is "noting"? May the notary give notice? Who pays the cost of protest? What is reëxchange?

Problem 25.

New York, Jan. 5, 1905.

Two months after date pay to the order of A. B. one hundred dollars.

To C. D., Chicago. E. F.

Pay to G. H. A. B.	Waiving protest. G. H.	Waiving notice. J. K.	Without recourse. L. M.	Pay to P. R. for collection. N. O.	

P. R. now holds the bill at maturity (March 5, Sunday) for the owner, N. O. (*a*) State exactly what P. R. should do as to presentment. (*b*) In case C. D. refuses to pay, state what P. R. should do in order fully to protect all the rights of N. O.

114. When should a check be presented? What is the result of delay? How should a check be sent by mail for collection? What is the effect if the holder has a check certified? if the drawer has it certified? May the holder of an uncertified check sue the bank? If a bank wrongfully dishonors a check, has the drawer any remedy?

Problem 26. A check drawn by B on a Bristol, Vt., bank and payable to A's order is mailed to A at Trumansburg, N.Y., and received there August 9. It is sent the same day to an Ithaca, N.Y., bank for collection. On August 10 the Ithaca bank mails it to its correspondent bank in New York City, where it is received on the 11th. On the 12th the New York bank mails it to its correspondent in Burlington, Vt. The 13th is Sunday. The Burlington bank receives it on the 14th, and sends it at once to Bristol, but the Bristol bank had already suspended on the 14th. If sent direct, the check would have reached Bristol in twenty-four hours after it was mailed at Trumansburg or Ithaca. A sues B on the check. Is B liable for the whole amount?

115. When all the steps have been taken to fix an indorser's liability what right has the holder against him? What are the indorser's rights if he pays?

PART IV

AGENCY: THE CONDUCT OF BUSINESS THROUGH REPRESENTATIVES

CHAPTER X

PRINCIPAL AND AGENT

116. Agency: its divisions and problems. Agency is a term signifying the legal relations established when one man is authorized to represent and act for another and does so represent and act for another. Most of the things that a man may do in person he may do through a representative. An individual often does, and a corporation necessarily must, employ persons to transact affairs and perform services essential to the proper conduct of a business. A single concern often has hundreds and even thousands of such employees. In an era of large business enterprises like the present the subject of agency is one of the most important in the whole range of business law.

The acts which a representative may perform for his employer fall into two classes: (1) the making of contracts for the employer; (2) the doing of operative or mechanical acts in the service of the employer. In order to mark the distinction the subject is divided into two corresponding heads, — the law of principal and agent and the law of master and servant. In the first there are three persons involved, namely, the principal, the agent, and the third party with whom the agent brings the principal into contractual relations. In the second there are normally but two persons involved, namely, the master and the servant; but if in performing the assigned service the

servant causes some injury to a third person, then three persons become involved.

In either class the relation itself is generally created by contract. The employer engages to pay an agreed compensation and the employee engages to perform agreed services; but an employee (agent or servant) may act gratuitously. So far as third parties are concerned the important question is whether the agent or servant was authorized to act, not whether he was promised compensation for doing so. If the agent or servant was not authorized, the principal or master would not be liable for what was done unless the act was subsequently ratified. Prior authorization or subsequent ratification is therefore the basis of a principal's or master's liability. The main problem of agency is to discover when and under what circumstances a man is liable for the acts of another who represents him or assumes to represent him.

The problem is not an easy one. If an employer were liable only for the specific acts which he expressly authorizes or ratifies, there would be little difficulty. But the law may hold a principal liable for a specific contract which he never authorized, or which he even forbade, upon the ground that he held his agent out to the world as authorized to make such contracts; in other words, it estops him from denying that an agent had the authority which he led others reasonably to suppose that such agent possessed. And it may hold a master liable for a specific act of a servant which was unauthorized or forbidden, upon the ground that the act was performed in the course of the business intrusted to the servant and in the furtherance of it.

Examples: 1. P authorizes A to travel and sell goods for him as his agent, but forbids A to hire a horse on credit, furnishing A with funds for the purpose. A hires a horse on the credit of P while traveling about P's business. P is liable. The general power conferred to travel and sell goods carries with it, as to third persons, the incidental power to contract for the means necessary to this end. This cannot be limited by secret instructions to the agent.

2. P intrusts A with goods to sell, but forbids A to receive the payment. The buyer pays A, who absconds with the money. P cannot recover again

from the buyer. An agent having possession of goods with power to sell them has implied authority to receive payment. But if the agent has not possession of the goods which he sells he has no implied authority to receive payment.

3. M tells S, his servant, to drive a load of goods to the railway station. S drives negligently and injures C. M is liable because S was about M's business.

4. As above. C is blocking the road. S becomes angry and drives his wagon into and injures C's wagon. If S does this to further M's business, that is, to get the goods sooner to the station, M is liable. If S does it *solely* to vent his own spite, M is not liable. This is a question for the jury.

I. Appointment of Agents

117. Who may appoint agents. Generally speaking, a person competent to make any contract is competent to appoint an agent by contract or ratification.

1. *Infants.* An infant's contracts are usually voidable at the election of the infant; they are not absolutely void. It is sometimes said, however, that his appointment of an agent is absolutely void; but this rule is now generally confined to one form of appointment, namely, by a formal sealed document known as a "power of attorney." The decided tendency of the courts is to hold the appointment of agents by infants, in any other form, to be voidable at the infant's election, like his other contracts. Thus an agency to sell the infant's horse would be voidable, while a power of attorney to sell and convey his lands would by most states but not by all be held void and of no effect. There seems to be no sound reason for such a distinction.

2. *Insane persons.* An insane person's contracts are voidable by him or his guardian if he has been judicially declared to be insane or if the other party to the contract knew him to be insane. In other cases the contract is binding if it has been so far executed that the other party to it cannot be put *in statu quo*. Perhaps a deed by an insane person is absolutely void. If an insane person, not adjudged to be so, appoints an agent by a formal "power of attorney," this may be void; but in any other case the third person who contracts with the agent in

good faith, with no notice of the principal's insanity, would be protected from loss thereby.

3. *Married women.* At common law a married woman could make no contracts in person, and could not therefore appoint an agent. But under the modern married women's acts, a married woman may generally contract as freely as an unmarried woman, and so far as she may make contracts in person she may appoint agents to make them for her.

4. *Corporations.* Corporations can act only through agents. The directors are the chief agents, and they may appoint such additional agents as are authorized by the charter or as are necessary to carry out the objects authorized by the charter (see sec. 150 *post*).

5. *Unincorporated associations.* Unincorporated associations, such as clubs and other societies, are not legal entities like corporations. If they appoint agents, the members individually and collectively are the principals so far as they authorized the appointment. Such authority may be gathered from the constitution and by-laws to which each member assents, or may be found in a specific vote of a meeting at which members were actually present. If the constitution provides that a majority vote shall bind all members, assent to the constitution is assent to any action thus taken under it. An agent or committee of a club may be personally liable when the other members are not.

Example 1. A college class voted to publish an annual and elected A business manager. A contracted with C for the printing. All the members of the class were present at the meeting except G. All are liable to C except G. If H had been present and had voted against the publication, the question whether he was also liable would be determined by a finding as to whether H acquiesced in the decision of the majority.

6. *Partnerships.* In a partnership each member is both principal and agent. Each is liable as principal for the acts of the other partners within the scope of the partnership business, and each by acting as agent for the partnership may bind them. One of the implied powers of a partner is to appoint necessary agents. If rightfully appointed, an agent may by his acts bind the partnership.

7. *Subagency.* A principal, P, may empower an agent, A, to employ a subagent. If under such authority A appoints B as subagent, B becomes agent of P. If there is no authority to appoint a subagent, the agent must act personally in all matters involving judgment, skill, or discretion, but may delegate merely ministerial or mechanical duties to another. In such a case the subordinate is the agent not of the principal but of the agent, and the latter is liable to the principal for any default of the subagent.

118. Who may be an agent. Any person may be an agent and be vested with authority to bind his principal. An infant, a married woman, and probably a lunatic may be the instrumentality for bringing the principal into contractual relations with third parties. If the principal chooses and empowers an agent, he must be responsible for the results.

A principal may appoint joint agents. Ordinarily joint agents must act jointly; but if a partnership is acting as agent one partner may act alone, and if a corporation is acting as agent a majority of the directors may decide for all.

119. Form of appointment. Generally an agent may be appointed by parol. To this there are two exceptions.

1. The Statute of Frauds in a few states requires that where a contract between P and C must be in writing and signed by P or his agent, the latter's authority to sign shall also be in writing. This is not generally found in the statute. As between the principal and agent, a contract of agency not to be performed within one year must be in writing; but if an agent acted under a parol contract the principal would as to third persons be bound by the agent's acts.

2. Where the contract between the principal and a third person is required to be under seal (as a conveyance of lands), the authority of the agent to execute the contract must also be under seal. Such a formal authorization is commonly called a "power of attorney." A power of attorney may be used in any case.

120. Ratification. Ratification consists in assenting to an act done in one's name or on one's behalf either by a person who had no authority to represent one at all or by a person who

Know all Men by these Presents,

That I, Thomas Martin, of the city of Elmira, county of Chemung, and state of New York,

have made, constituted and appointed, and by **These Presents** do make, constitute and appoint Walter Brown, of the said city, my true and lawful *attorney* for me and in my name, place and stead, to grant, bargain, and sell all such lands, tenements and hereditaments whatsoever, situated in the state of New York, whereof I now am, by any ways or means howsoever, entitled to or interested in, either in severalty or jointly, or in common with any other person or persons, or any part, share, or proportion thereof, and all such right, title, interest, claim and demand, both in law and in equity, as I may have in the same, for such sum and price and on such terms as to him shall seem meet,

giving and granting unto my said *attorney* full power and authority to do and perform all and every act or thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said *attorney* or his substitute shall lawfully do or cause to be done by virtue thereof.

In Witness Whereof, I *have* hereunto set my *hand* and *seal* the fifth day of January, One thousand nine hundred and five.

In Presence of
James Wilson

Thomas Martin SEAL

[L.S.]

State of New York,
County of Chemung } ss.
City of Elmira

On this fifth day of January in the year One thousand nine hundred and five before me, the subscriber, personally appeared Thomas Martin to me personally known to be the same *person* described in and who executed the foregoing instrument, and *he* acknowledged to me that *he* executed the same.

{ NOTARY'S SEAL }

Henry Price
Notary Public for Chemung County, New York.

having some authority exceeded it. When such unauthorized act comes to the attention of him in whose name or on whose behalf it was ostensibly done, he has an election to repudiate it or to adopt it. If he elects to adopt it, this constitutes ratification, and he is in precisely the same situation as if he had originally authorized it.

Example 1. A, knowing his friend P is on the lookout for a rare book, and seeing one at a bookshop, buys the book in P's name and upon P's credit. When P learns of this he tells the bookseller to send him the book, but later, before receiving it, countermands the order. P has ratified and cannot afterwards withdraw his assent. P's contract dates from the time of the sale to A, not from the time of ratification.

1. *Essentials of ratification.* The essentials of ratification are given below.

(*a*) The contract must have been made in the name of and in behalf of an existing and ascertainable person. If one contracts in the name of a corporation not yet formed, the corporation when formed cannot strictly ratify, although its assent may amount to the acceptance of an offer. So if A intending to act without authority for P makes a contract in his own name, P cannot ratify.

(*b*) The one in whose name the contract was made must assent to it. Such assent may be implied for example by accepting benefits under the contract. Silence alone is not assent where one without any authority whatever has assumed to act for another, but where an agent merely exceeds his authority his principal's silence after full knowledge of the facts may amount to assent. The assent must be as to the whole act; the principal cannot ratify a part and disaffirm a part. If he takes the benefit he must bear the burdens.

Example 2. A without any authority sold and delivered to C a load of coal belonging to P. In delivering the coal he negligently broke C's window. P sent C a bill for the coal. P thereby ratified A's acts and became liable to C for damages for the broken window.

(*c*) The principal must be competent. If he could have appointed an agent, he can ratify with the same results as if he had previously authorized (see sec. 117 *ante*).

(*d*) If the principal must adopt a particular form in order to appoint, he must follow the same form in order to ratify (see sec. 119 *ante*).

2. *Ratification of forgery.* If A forges P's name to an instrument, as a promissory note, can P ratify the act? Upon this the cases differ. Some hold that P may ratify because he could have authorized. Others hold that P cannot ratify because A does not in fact assume to act for P in a forgery, and that P's only motive in ratifying would be to conceal the crime of A. But all cases agree that P may be estopped to deny the validity of the signature where, after P acknowledges such validity, the instrument is taken by an innocent holder for value relying upon such acknowledgment.

3. *Legal effect of ratification.* Ratification relates back to the time of the formation of the contract or the doing of the act, and the principal and the third person are in the same position as if the agent had in fact had full authority at that time.

4. *Effect of nonratification.* If the principal refuses to ratify, the agent is liable to the third party in damages for a breach of his implied warranty of authority. Every agent who makes a contract in the name of another warrants that he has authority from that other to make it.

121. Agency by necessity. A wife has implied authority given her by the law to pledge her husband's credit for necessaries. This exists independent of the will of the husband. But the one furnishing the goods has the burden of showing that they were in fact necessaries and that they were not otherwise provided.

An infant child has not, in England and in some of our states, any similar authority to pledge his father's credit for necessaries; but some states give him such implied authority. This is therefore a disputed question.

An unpaid vendor in possession of the goods has implied authority to sell them for the vendee and charge the vendee the difference between the contract price and the amount received upon the resale (see sec. 58 *ante*).

122. Termination of agency. An agency may be terminated in various ways, some of which are as follows.

1. *By the parties.* The parties may agree to terminate it, or, subject to the exception noted in the next section, the principal may dismiss the agent, or the agent may quit the employment. If either principal or agent wrongfully terminates the agency, he is liable to the other party for breach of contract. If the principal terminates it, he should notify third persons with whom the agent has been accustomed to deal, or he may, as to them, be estopped to deny the agency if the agent makes further contracts with them. If the agent or servant wrongfully quits the employment before the contract term has expired, he cannot in most states recover any compensation for what he has already done; but a few states allow him to recover the value of such services less the damages the principal or master has suffered from the breach.

2. *Death.* Subject to the exception noted in the next section, the death of either party terminates the agency. If after the death of the principal the agent, though ignorant of such death, makes a contract with a third party, also ignorant of such death, the contract binds no one. The dissolution of a corporation has the same effect as the death of an individual.

3. *Illness of agent.* The illness of an agent may create an impossibility of performance, which will terminate the agency. The illness of the principal would ordinarily have no effect.

4. *Insanity.* The insanity of either party would terminate the agency. But if the principal becomes insane, a person who deals with the agent in ignorance of such insanity, and before the principal has been judicially declared to be insane, would be protected.

5. *Impossibility.* If the subject-matter of the agency is destroyed, the agency would of necessity be terminated. If the agent is arrested and imprisoned, this, like illness or insanity, renders further performance by him impossible. If two agents are authorized to do the same act and one accomplishes it, the agency of the other is terminated.

123. Irrevocable agencies. The above rules are subject to the exception that if an agency be "a power coupled with an interest," the agency is irrevocable. An agent has a power

coupled with an interest when to his authority to act for his principal is added an interest in the subject-matter of the agency itself, as distinguished from an interest in the compensation he is to receive for his services.

Examples: 1. P pledges goods to A for a debt and gives A power to sell the goods upon default. P cannot revoke this power nor will it be revoked by P's death or insanity. A has an interest in the subject-matter to secure his debt.

2. P sends goods to A, a commission merchant, to sell for him, and requests A to make an advance of a specified sum. A does so. P cannot revoke this agency nor will the law revoke it. A has an interest in it beyond the interest of acting as agent, because he is to reimburse himself to the extent of the advance from the proceeds of the sale. But the interest in the compensation alone does not constitute a power coupled with an interest.

II. Obligations of Principal and Agent to Each Other

124. Obligations of principal to agent. The obligations of the principal to the agent may be briefly enumerated under the heads of compensation, reimbursement, and indemnity.

1. *Duty to compensate agent.* The principal must pay to the agent the agreed compensation, if any, or a reasonable compensation where none has been agreed upon. If the principal ratifies an unauthorized act, the same result follows. If the principal wrongfully revokes the authority, the agent may sue for the breach. His damages are presumptively the entire stipulated compensation, but the principal may show what the agent might have earned in a similar occupation during the unexpired term and thus reduce the damages. An agent would not be justified in remaining idle after his discharge if he could by reasonable diligence secure other and similar employment. If the agency is revoked by impossibility, the agent may recover the reasonable value of the services actually performed. If the agent renounces the employment, he can recover no compensation in most states; but some permit him to recover the reasonable value less the damages sustained by the principal from the breach. An agent cannot recover compensation for illegal services, as lobbying, betting, and the like.

2. *Duty to reimburse agent.* The principal must reimburse the agent for all expenses necessarily incurred by him in the discharge of the agency, unless the agent's compensation is intended to cover these expenses.

3. *Indemnity.* If an agent is compelled to pay damages because of his innocently following his employer's instructions, he is entitled to be indemnified.

Example. P directs A to sell certain goods. A does sell them. C afterwards claims the goods were his and sues A for conversion and recovers from A their full value. P must indemnify A. But if A had known the goods did not belong to P he could not recover indemnity.

125. Obligations of agent to principal. An agent owes to his principal the duties of obedience, prudence, skill, and good faith, and is also bound to render accounts. He cannot delegate his duties.

1. *Obedience.* The agent must follow his instructions faithfully. If he does not, and loss ensues, he must make it good.

Example 1. P sends to A goods to be sold for cash. A sells them to C and takes C's check. The check is dishonored and C absconds. A is liable to P for the loss.

2. *Prudence and skill.* An agent is bound to possess and to exercise the prudence, skill, and diligence necessary to the proper conduct of the business intrusted to him.

Examples: 2. P sends A money to loan upon security. A loans it upon worthless securities which a prudent investor would not take. A is liable to P for the loss.

3. P authorizes A to effect insurance on P's property. A takes a policy in a company which prudent men believe to be of doubtful solvency. Loss ensues. A must make it good.

3. *Good faith.* The relation is a fiduciary one. The agent is bound to act with entire good faith toward his principal. He cannot act for both his principal and a third party. He cannot buy his principal's property, or sell his own to his principal, without the latter's full knowledge.

Examples: 4. P directs A to buy a horse. X directs A to sell a horse. A sells X's horse to P. Neither P nor X is bound. A cannot act for both parties unless each knows that his agent is also acting for the other. A can recover no compensation.

5. P directs A to buy a horse. A sells P his own horse. When P discovers this he may rescind the contract. A cannot be both buyer and seller.

6. A works for P in the manufacture of a secret compound. Afterwards A begins to manufacture the same compound. P may enjoin A from doing so. An agent or servant cannot disclose, or use for his own advantage, trade secrets learned while in the employment of another.

4. *Accounting.* The agent must keep and render accounts. He must keep his principal's money or goods separate from his own; if he mixes them and any loss results, the agent must bear it. He can make no secret profits out of his principal's business. He cannot even keep moneys obtained for the principal in an illegal transaction.

Examples: 7. An agent deposits his principal's money in a bank in his own name. The bank fails. The agent must bear the loss. Had he deposited in his principal's name (P, by A, agent), the loss would have fallen on the principal if the agent acted prudently in selecting the bank.

8. P directs A to purchase coal. The trade price is $5 a ton. X agrees that if the agent will purchase of him he will return to the agent 50 cents on each ton. A buys of X and P pays X at the rate of $5 a ton. X gives A 50 cents on each ton. P may compel A to account to him for this money.

5. *Nondelegation of duties.* An agent cannot delegate to another the exercise of any discretion or judgment unless his principal has authorized him to do so. He may delegate the performance of merely mechanical duties, like the writing of contracts or other documents, but of course is liable for the result. If he delegates discretionary duties without authority, he is liable for any loss. If he has authority to select subagents, he is liable only if he fails to exercise due care in selecting them.

Examples: 9. P directs A to sell goods. A engages B to sell them and turns them over to B. A is liable in tort for conversion of the goods in delivering them to B to sell.

10. P deposits a check in the X bank in New York for collection. The check is drawn upon a bank in Chicago and the X bank sends it to the Y bank in Chicago for collection. The Y bank negligently fails to present it in due time and loss ensues to P. Is the X bank liable to P? Upon this courts differ. Some say P impliedly authorizes the X bank to employ a subagent, and if the X bank uses due care in selecting the Y bank it is not liable. Other courts say P contracts with the X bank alone and assumes

no responsibility for the acts of those whom the X bank engages to assist in the collection. The real question is, Had the X bank authority from P to appoint a subagent for P?

6. *Del credere agent.* A *del credere* agent undertakes to guaranty the principal against loss from credits given by the agent to third persons in the course of the agency. In the United States it is generally held that the agent is liable primarily and not as a mere guarantor, and that therefore his promise need not be in writing. This agency is pretty close to a sale by the principal to the agent and resale by the agent to third persons, but it differs in that the title to the goods remains in the principal until they are sold to third persons.

7. *Gratuitous agent.* If an agent promises to act gratuitously, the promise is unenforceable. But if he does act he is bound to act with some care and prudence. It is generally said that he is bound to use slight care and is liable only for gross negligence. The true standard is the care that reasonable men give under like circumstances. For example, bank directors serve gratuitously; a particular board is not bound to use as much care and vigilance as an individual banker gives to his own business, but must exercise the care which is ordinarily and reasonably given by such boards as that is fixed by usage and experience (see sec. 63 *ante*).

III. Liability of Principal to Third Parties

126. General rules. The principal is liable upon all contracts made by his agent within the scope of the actual authority given to the agent.

The principal is also liable upon all contracts made by the agent within the scope of the apparent or ostensible authority conferred upon the agent.

The principal is not liable upon contracts made by his agent beyond the scope of the actual or ostensible authority unless he ratifies such contracts.

Examples: 1. P authorizes A to sell goods, but at not less than market price, and to responsible parties only. A sells to X. P seeks to escape the

contract on the ground that X is not a responsible party and that A sold X the goods at less than the market price. *Held:* P is bound by the sale. His instructions to his agent, not communicated to X, could not limit the ostensible authority of the agent. Of course A is liable to P for any loss occasioned by his disobedience of instructions.

2. P authorizes A to sell goods. A barters P's goods for X's horse and buggy. P is not bound. An authority to sell is not in any sense an authority to barter.

3. P authorizes A to buy goods on credit. A buys goods of X for P and gives X a promissory note signed "P, by A, agent." P is not bound. An authority to buy on credit is not an ostensible authority to make negotiable paper. (*Problem:* What is X's remedy upon this note? See sec. 120, par. 4.)

127. Agent's apparent authority. Apparent authority is that authority which may reasonably be inferred from the circumstances of the agency. In determining whether an agent has apparent authority to do a particular act the following circumstances may be considered.

1. *Powers actually conferred.* The powers actually conferred may be the limit of powers real and ostensible. This is particularly the case where the authority is contained in a formal power of attorney. Such an instrument is construed strictly, and the third person is bound to examine it in order to determine the extent of the agent's authority. A power of attorney to sell lands in New York would confer no authority to sell lands in Massachusetts (see p. 220). If the power is conferred in an instrument not under seal, or orally, the construction is more liberal; but in such a case the third person cannot claim to rely upon an apparent authority if he knows the exact terms of the actual authority.

2. *Powers incidental to those conferred.* With every actual authority goes the implied authority to use the means reasonably necessary to carry out the actual authority. An authority to sell and convey real property carries with it the power to make a deed containing the usual covenants of warranty, and to receive the purchase money upon delivery of the deed. The authority to travel at the principal's expense in order to sell goods carries with it the power to hire a horse or use other reasonable means of travel.

3. *Powers annexed by custom.* The incidental powers may be enlarged by custom or usage. Some agents, like factors, brokers, and auctioneers, follow a customary calling, and naturally many usages of the calling have grown up. One who employs such an agent is supposed to do so with knowledge of established usages, and must be held to clothe the agent with all the authority customarily exercised by agents in that calling.

4. *Powers inferred from the conduct of the principal.* Over and above the actual, incidental, and customary powers of an agent there may be apparent powers gathered from the conduct of the principal. If a principal by his conduct leads third persons reasonably to infer that he has given his agent certain powers, and they act upon this appearance of authority, the principal will be estopped to deny that his agent did possess those powers. If, after an agent has made a mortgage investment for his principal, the principal permits the agent to retain the bond and mortgage, he will be estopped to deny that the agent had authority to receive the interest or installments due upon the securities.

5. *General and special agents.* A general agent is one authorized to act for his principal in all matters pertaining to a particular business. A special agent is one (other than an agent following a customary calling) who is authorized to act for his principal in a single specific transaction. A principal impliedly confers larger powers upon a general agent than upon a special one. A third person should know that an agent engaged to do one special act is likely to have special instructions, and should inquire into the extent of the authority. In such a case the actual authority is less likely to be enlarged by any of the considerations above enumerated ; but even in such a case private instructions not communicated to the third person may not avail the principal.

Examples: 1. P puts his grocery store in charge of A, as general manager, to buy and sell goods and transact the necessary business. A exchanges sugar for eggs. This is within his implied powers.

2. P authorizes A as a special agent to sell a barrel of sugar. A exchanges the sugar for eggs. This is not within his implied powers.

128. Agents following customary calling. Some forms of agency are so well established and have been so long practiced that they have gathered a considerable body of customs in conformity with which such agencies are conducted. A few of these will be briefly considered.

1. *Factors.* Factors or commission merchants are agents whose regular business it is to receive consignments of goods and sell them for a commission or percentage. The principal is bound by the customs of the calling. These customs have been adopted in order to protect innocent purchasers who are unable to know whose goods the factor is selling or what instructions the owner may have given. The factor may sell at any price, for cash or credit, warrant the goods if such goods are customarily sold with a warranty, and may take negotiable instruments in a sale on credit. He cannot barter the goods. At common law he cannot pledge them for his own debt, but under the Factors Acts an innocent pledgee is protected.

2. *Brokers.* Brokers are agents whose regular business it is to make contracts without having possession of the goods, or to negotiate for the purchase of property, or for loans, or for insurance, and the like. A merchandise broker who sells goods has less apparent authority than a factor because he has not possession of the goods. He cannot receive payment; he cannot usually warrant the goods; custom may permit a sale on credit, but the custom in this respect is not so broad as in the case of factors.

3. *Auctioneers.* Auctioneers are agents whose business it is to sell property publicly to the highest bidder. Until the fall of the hammer he is the agent of the seller; after that he is also agent of the buyer so as to enable him to make the note or memorandum required by the Statute of Frauds. He must sell for cash, and not, unless specially authorized, on credit or for other goods or for negotiable paper. He may receive payment. He cannot warrant unless specially authorized, nor can he rescind the sale when once made.

4. *Attorneys at law.* An attorney at law is an agent whose business it is, as a duly qualified officer of the court, to represent

his principal in the conduct of litigation or other legal proceedings. He has implied authority to control the proceedings, but he cannot compromise or release his client's claim or give up any substantial right of his client unless specially authorized. He may receive payment in full and give a release. He is bound to the highest good faith toward his client, and is liable to the client for the negligent management of the affairs intrusted to him.

5. *Bank cashiers.* A bank cashier is the chief executive officer of a bank. Tellers and other subordinate officers are under his control. He has power to draw checks or drafts upon the funds of the bank deposited with other banking or trust companies; to indorse and transfer for collection, discount, or sale the negotiable paper or other securities owned by the bank; to certify checks drawn upon the bank by depositors; to collect moneys due the bank; to borrow money and to loan money.

129. Undisclosed principal. An agent in making a contract may do so in his own name without disclosing to the third party that he is in fact acting for a principal. Factors usually make contracts in this way. In such cases the agent is always liable, but the principal may be also. Conversely the principal may enforce such a contract against the third party.

1. *General rule.* Subject to some exceptions, an undisclosed principal is liable to third parties with whom an authorized agent has dealt within the scope of the agency, in the same way and to the same extent as a disclosed principal, although the third person supposed he was dealing with the agent as principal.

The rule works both ways. An undisclosed principal may claim the benefits of a contract made by his agent in the course of the agency.

Examples: 1. A business is conducted in the name of A, who buys goods of X. Later X discovers that P owns the business. X may recover the price of the goods from P.

2. A business is conducted in the name of A, who sells goods to X. The owner, P, may recover the price of the goods from X.

2. *Exceptions.* To these rules there are some exceptions, and a few of them may be noted.

(*a*) If the principal or the third party has in good faith settled his account with the agent, he is no longer liable.

Examples: 3. If A conducts P's business in his own name and buys goods of X, and A and P have an accounting which includes this item, X cannot afterwards sue P.

4. If under like circumstances A sells goods to X, and X has paid A or otherwise settled with him, P cannot afterwards sue X.

(*b*) In contracts under seal only the parties named in the contract can sue or be sued, and hence an undisclosed principal could neither sue nor be sued upon such a contract.

Example 5. A sealed instrument is signed "A. B., C. D., E. F., Trustees of the X Church." The church is not liable. The instrument should be signed "The X Church, by A. B., C. D., E. F., Trustees." Had this been a simple contract (not under seal), the church could have been sued upon it.

(*c*) In negotiable instruments, only the party named as maker, drawer, or indorser can be sued. Hence if an agent signs such an instrument in his own name, he alone is liable upon it. So also only the payee can sue; but this part of the rule is not important, since the payee by indorsing the instrument could confer upon the undisclosed principal or any other person the right to sue.

Example 6. A buys goods for P without disclosing P, and gives a promissory note to X's order, signed "A, agent." X cannot sue P upon this. The word "agent" has no more effect than if A had signed "A, shoemaker," or "A, Republican." These are mere words of description. A alone is liable. Had this been a nonnegotiable instrument P could have been sued upon it.

(*d*) If, after discovering the principal, the third party unequivocally elects to hold the agent, he cannot afterwards proceed against the principal. The third person has an option to hold the agent to the contract made in the agent's name, or to disregard the agent and proceed against the principal. But he cannot do both. He must elect, and his election once made is binding upon him.

130. Frauds by agent. If in the course of an authorized negotiation for the principal an agent makes unauthorized false representations, amounting to fraud or deceit, concerning the subject-matter of a contract, the principal is liable in the same way as if he had made them personally (see sec. 29 *ante*).

If the agent commits a fraud for his own benefit and not for his principal's, but by means of instrumentalities intrusted to him by his principal, the latter may be liable.

Examples: 1. A stock transfer agent of a corporation fraudulently issues stock certificates and sells them for his own benefit. The corporation is held liable in New York and many other American states.

2. An agent, authorized by a railway company to receive goods and issue bills of lading, fraudulently issues bills of lading for wheat where no wheat is received, and sells the bills of lading to innocent buyers. In New York and many other states the railway is liable, but England and some of our states hold otherwise.

3. A is both telegraph operator and express agent at M. He telegraphs X in the name of X's agent, requesting the transmission of money by express. X sends the money by express. The agent takes it and absconds. The telegraph company is liable to X.

IV. Liability of Agent to Third Parties

131. Where agent alone is liable. If an agent exceeds his authority so that his principal is not bound, the agent is liable to the third party for the breach of his warranty of authority. He is not liable on the contract itself when that was made in the principal's name. The agent is liable for any fraud, deceit, or other tort committed by him while about the principal's business.

If an agent contracts for a fictitious principal, he is liable upon the contract himself.

If an agent signs a sealed instrument or a negotiable instrument in his own name, or in his name with merely descriptive matter after it, he alone is liable unless the body of the instrument shows by its recitals that it is the principal's promise.

Example. "We, as trustees of the X Church, promise to pay to the order of G.H. one hundred dollars. A. B., C. D., E. F., Trustees of the

X Church." This binds the X Church. But if it had read, "We promise to pay, etc.," and been signed in the same way, the church would not have been liable (see sec. 129, par. 2 (*b*), *ante*).

132. Where both principal and agent are bound. In a contract made by an agent for an undisclosed principal both are bound, that is, the third party may elect to hold either. Even a written contract (other than a sealed or negotiable one) signed by the agent alone may be shown by parol evidence to be in fact the contract of an undisclosed principal. This has already been sufficiently considered.

REVIEW QUESTIONS AND PROBLEMS

SECTION **116**. What is the meaning of agency? Into what two branches does the subject fall? Explain each. How is the relation created? What is the problem as to third persons? Why is it difficult? Why is or is not the principal or master liable in each example given?

117. May an infant appoint an agent? Is the appointment voidable? Is it void? Same questions as to an insane person? a married woman? If one contracts in behalf of an unincorporated club who is bound? Is a member bound who votes against the making of the contract? May one partner bind another by appointing an agent? May an agent by appointing a subagent bind his principal?

Problem 1. An infant P authorizes an agent A by power of attorney to sell and convey P's real property. A sells and conveys P's property. When P comes of age can he ratify this sale and conveyance, or in order to make it valid must he then execute a new conveyance? What of an infant's authority to an agent to sell a horse? to buy one?

Problem 2. P when sane authorizes A to buy goods for him. P becomes insane, and A afterwards purchases of X, who does not know of P's insanity. Is P bound?

118. Who may be an agent? How must joint agents act? Exception?

119. When must an agent's appointment be in writing? When must it be under seal? Draw a power of attorney to collect debts and give receipts for the same.

120. What is ratification? What are the essentials? If in Example 1 A had bought the book in his own name could P ratify? Is silence ratification? Can one ratify a forgery of his name to an instrument? How can

one be estopped in such a case? If one ratifies, from what time does the contract obligation date? If one refuses to ratify, what are the third party's rights?

Problem 3. A is the promoter of an intended corporation. He makes a contract for it. When it is duly chartered the corporation ratifies the contract. Is it liable for a subsequent breach of the contract?

Problem 4. A without authority makes a contract in his own name but intending it for the benefit of P. When P hears of it he ratifies it. Is P bound?

Problem 5. A without authority conveyed P's land to X. P received the purchase money. X claims this was a ratification. Is it so?

121. What is a wife's implied authority as agent? an infant child's? an unpaid vendor's?

122. How may an agency be terminated by act of the parties? If a principal terminates it, what are the rights of the agent? of third parties? If the agent terminates it before the contract expires, what may he recover for services already rendered? What is the effect of the death of either party? of illness? Effect of impossibility?

Problem 6. P authorized A to sell his lands. Later he also authorized B to sell them. On September 9 A sold them to X. On September 10 B sold them to Y. P conveyed to X, and Y sues P for breach of contract. Result?

Problem 7. P authorizes A to receive payments of X. P dies. X pays A, neither knowing of P's death. Is the payment binding upon P's estate?

123. What is an irrevocable agency? What is a power coupled with an interest? Illustrate.

Problem 8. P borrowed $2000 of A, and gave the latter a power to collect certain rents and pay himself from the proceeds. P died. Was the agency to collect the rents terminated? Suppose a tenant had paid rent to A after P's death?

124. What are the obligations of the principal to the agent? What are an agent's damages when the principal wrongfully revokes the agency? When an agency is revoked by impossibility or by the death of the principal how much may an agent recover? What is reimbursement? What is indemnity?

Problem 9. A agrees to work for P for a year at $20 a month. At the end of four months A quits the employment without cause. How much may A recover of P?

Problem 10. In a similar case P discharges A without cause at the end of four months. How much may A recover?

125. What are the agent's duties? Illustrate each. If an agent acts for his principal and also for a third person, what is the result? If an agent makes a secret profit, what is the result? May an agent delegate his duties?

Explain and illustrate. What is a *del credere* agency? How does it differ from a sale? What are the obligations of a gratuitous agent?

Problem 11. P directs A to pay taxes on P's land. A neglects to do so. The lands are sold for taxes. A bids them in and takes a tax deed. Is it good against P?

Problem 12. A sold for P certain prize packages which it was illegal to sell, and received the money for them. P sues A for the money. A sets up the illegality. Result?

Problem 13. P authorizes A to accept bills of exchange drawn on P. When a bill comes in, A decides to accept it, and tells B, a clerk, to write the acceptance. B writes, "Accepted, P, by B." Is P bound? How would it be if A had told B to exercise his judgment and accept bills and B had accepted this?

126. State the rules as to a principal's liability to third persons for the acts of his agent. Illustrate.

127. How is an agent's apparent authority determined? What is actual authority and how determined? What are incidental powers? Illustrate. What are customary powers? What are powers arising from the conduct of the principal? Illustrate. What is the distinction between general and special agents? Illustrate.

Problem 14. P gives A general authority to sell goods. A sells them to X and warrants them. Is P bound by the warranty?

Problem 15. P directs A to loan money and take a note and mortgage. A does so. The note and mortgage remain in A's hands. The borrower pays A. Is P bound by this payment?

Problem 16. P authorizes A to make collections. X gives A a check payable to the order of P. A indorses the check in P's name, obtains the money, and absconds. Does the loss fall upon P or the bank?

128. Define factor. Explain his powers. Define broker. Distinguish from factor. Define auctioneer. Whose agent is he? Define attorney at law and state some of his powers. State the powers of a bank cashier.

Problem 17. A broker is authorized by P to sell goods and sells them to X. P delivers the goods to X. The broker then collects the price from X and absconds. P sues X for the price. Can he recover?

Problem 18. P authorized an auctioneer to sell his farm for $500 cash down, balance in thirty days. These terms were publicly stated at the time of the auction. The auctioneer sold to X for $3000, and took X's check for the $500. X had no funds in bank to meet the check, but two days later deposited funds and the check was paid to the auctioneer. Meanwhile P had learned of the transaction and repudiated the sale. X now sues P for breach of contract. Result?

129. What is an undisclosed principal? State the general rule as to the liability of an undisclosed principal. State the general rule as to his rights. State the exceptions and illustrate each.

Problem 19. P owns a hotel. He conducts it in the name of A, and it is supposed that A is the proprietor. X sells cigars on credit to A for the hotel. P has forbidden A to buy cigars on credit. Is P liable to X for the cigars?

Problem 20. In the above case P, after learning that A bought on credit, settled with the agent, paying him in full for the cost of the cigars. Can X then recover of P?

Problem 21. In the above case (Problem 19) X, after learning that P is the true principal, sues A and obtains a judgment against him. This remains unsatisfied, and he then sues P. Can he maintain this action?

Problem 22. In the above case (Problem 19) X warranted the cigars. They turned out to be inferior to the warranty. Can P recover against X for breach of the warranty?

Problem 23. In the above case (Problem 22) the agent, before X knows that P is the true principal, settles with X for the breach of warranty. Can P now sue X?

130. Is the principal liable for the frauds of the agent committed for the principal's benefit? for the agent's benefit? Illustrate.

Problem 24. P authorizes A to sell his land. A sells to X and fraudulently represents the land to be well timbered and well watered. When X discovers the fraud he sues P, who has received the purchase money without knowing of his agent's fraud. Is P liable to X in this action for deceit?

131. How is an agent liable to the third person upon an unauthorized contract? How is he liable if he deals in the name of a fictitious principal? How is he liable if he signs in his own name a sealed or negotiable instrument?

Problem 25. P authorizes A to issue insurance. A without authority represents to X that he may keep petroleum upon the insured premises. X's premises burn. P successfully defends an action upon the policy because X kept petroleum. X sues A for breach of his warranty of authority to make such representation. Result?

132. Who are liable on an authorized written or oral contract made by an agent in his own name?

CHAPTER XI

MASTER AND SERVANT

I. Injuries to Third Persons

133. Negligent torts by servants. If in the conduct of his master's business a servant negligently injures a third person (other than a fellow-servant), the master is liable to the injured person; the servant is of course also liable, because every one is liable for his own torts. But if the injury is due to some contributing negligence of the third person, he cannot recover from either the master or the servant.

Examples: 1. A railway engineer negligently runs over X at a railway crossing. The railway company is liable to X. The engineer is also liable.

2. A workman negligently allows a brick to fall from a building into the street. It strikes and injures X. The employer of the negligent workman is liable to X. The workman also is liable.

3. A servant at a hotel negligently spills soup upon a guest's dress. The hotel keeper is liable for the damage. The servant also is liable.

4. X negligently fails to look and listen at a railway crossing. The engineer negligently fails to sound a signal. X is struck and injured by the locomotive. He cannot recover because of his contributory negligence.

134. Willful torts by servants. A master is liable for willful torts committed by his servant in the course of the employment and in the supposed furtherance thereof. If the servant is acting for the master and supposes, however mistakenly, that his act will further the master's interests, the master is liable.

Examples: 1. X's vehicle obstructs the M. Street Ry. Co.'s track. S is motorman on one of its cars. S orders X to get off the track. There is a dispute and S purposely drives his car against X's vehicle and damages it. The Ry. Co. is liable if S did this in order to get a clear track and make his schedule time. S also is liable for his own tort.

2. S sells tickets for the M. Elevated Ry. X buys a ticket and lays down a bill. S gives X the change and then mistakenly thinks the bill is

counterfeit and has X arrested. The Ry. Co. is liable for false imprisonment if S did this in order to get good money for the ticket; but if S did it to serve the public and punish a supposed criminal, the Ry. Co. is not liable. In either case S is personally liable.

A public carrier of passengers is liable for any willful injury done to a passenger by one of its employees, whether done in the supposed discharge of a duty or out of personal malice. The carrier owes a very high duty to passengers.

Example 3. A street-car conductor sees one of his enemies on the street car and assaults him to pay off an old grudge. The street-car company is liable. The conductor is of course personally liable.

II. Injuries to Servants

135. Injury to one servant by another. The master is not liable to one servant for an injury occasioned by the negligence of a fellow-servant. He is liable for an injury occasioned by the negligence of a vice principal.

A vice principal is one who is charged by the master with the performance of any of these duties: (*a*) providing a safe place to work; (*b*) providing safe tools; (*c*) providing a sufficient number of competent servants; (*d*) providing suitable rules and regulations to govern the service; (*e*) providing inspection and repair of instrumentalities; (*f*) providing special warning of any extraordinary danger. If one charged with performing any of these duties is negligent in the performance thereof and an employee is injured in consequence of such negligence, the master is liable. The master does not insure safety in these respects; he insures that due care will be taken.

A fellow-servant is one who performs operative acts. If in operating machinery or in any similar act one fellow-servant injures another, the master is not liable. It is said that a servant in entering the employment assumes the risk as to the negligence of his fellow-servants.

Examples: 1. S and T are both employed by M. S is told to repair a machine and does so negligently. The machine breaks down while T is operating it and injures T. M is liable to T. In repairing the machine S was a vice principal.

2. Owing to the negligence of S in operating a machine T is injured. M is not liable to T. In operating the machine S is a fellow-servant of T.

3. Owing to the negligence of a railway engineer a train is derailed and a brakeman injured. The railway company is not liable to the brakeman. An engineer is a fellow-servant of a brakeman; so also is a conductor; so also is a switchman. But a train dispatcher is a vice principal.

In Ohio and some other states a superior officer, like a conductor or a manager or a foreman, is always a vice principal even if he performs operative acts; but the general rule is that it is the nature of the act and not the rank of the actor that is decisive. Employers' Liability Acts exist in several states, enlarging the liability of the master to one servant for the negligence of a co-servant.

136. The master's nonassignable duties. The duty to use care to furnish safe machinery, safe tools, proper inspection, and the like, as specified in sec. 135, is called a nonassignable duty, because no matter who is delegated to perform it the master remains liable to his servants for any negligence in that regard.

This rule is qualified by the further rule that if a servant with full knowledge of some defect remains in the employment he "assumes the risk" as to the defect and cannot recover from the master if he is injured in consequence of it.

Example 1. S is told to operate a machine. He knows it is defective. He operates it and is injured because of this defect. He cannot recover.

But if the master promises to repair the defect, the servant may remain a reasonable time without assuming the risk.

Example 2. As above. S objects to the machine because it is defective. The master promises to repair it. The next day S is injured. The master is liable to S.

In any case a servant cannot recover if his injury is due to his own contributory negligence.

Example 3. S, after the master's promise to repair, operates the machine. He is injured by his own negligence in the manner of operating it. He cannot recover.

REVIEW QUESTIONS AND PROBLEMS

SECTION **133**. When is a master liable for negligent injuries by his servant to a third person? What will bar the action?

134. When is a master liable for willful injuries inflicted by his servant upon a third person? What is the rule as to public carriers?

Problem 1. B, a boy of twelve, steals a ride on a freight train. The brakeman discovers him and pushes him off while the train is in motion, and the boy is injured. Is the railway company liable?

Problem 2. B is employed to repair electric lights in X's building. While he is on a stepladder X's janitor, who is sweeping the room, pushes the ladder intentionally and B falls and is injured. Is X liable?

135. Who is a vice principal? Who is a fellow-servant? Is a superior officer a vice principal? What is the usual test as to the master's liability to one employee for a negligent injury by another employee? What is the purpose of Employers' Liability Acts?

Problem 3. Owing to the negligence of a switchman a train is derailed and the engineer injured. Is the railway company liable to its engineer for the negligence of its switchman?

Problem 4. B was a laborer in X's factory. C was superintendent of the factory. B was lifting a fly wheel of an engine off from its center, when C negligently turned on the steam and started the wheel, injuring B. Is X liable to B?

Problem 5. A workman in the X. Ry. Co.'s repair shops negligently repairs a locomotive boiler. When it is used it explodes and injures an engineer. Is the railway company liable?

136. What are the master's nonassignable duties? How may the risk as to these be shifted to the employee? What is the effect of a promise to repair a defect? What is the effect of contributory negligence?

Problem 6. B was X's domestic servant, and X agreed to furnish board and lodging. B's room leaked. X promised to repair the roof. B stayed, and owing to the leak took cold and was ill. Is X liable to B?

PART V

BUSINESS ASSOCIATIONS

CHAPTER XII

PARTNERSHIPS AND JOINT-STOCK COMPANIES

137. Forms of conducting business. Business may be conducted by a sole trader, or by a partnership, or by a joint-stock company, or by a corporation.

A sole proprietor or trader is one who conducts his business in person or through agents without admitting any one else to share in the profits. He alone owns the property embarked in the business; he alone has a decisive voice in the management of the business; and he alone is liable for debts and entitled to credits. He may, of course, have agents to whom he intrusts many important matters, but they are his employees and are responsible to him alone.

It is the combination of persons in business that calls for special consideration.

1. *Partnerships.* In order to increase capital and make it possible to do a larger business, two or more persons may combine and do business together as one firm. A partnership involves a high degree of confidence in the ability, fidelity, and integrity of one's partners, without relieving one of personal liability to third persons for contract obligations and torts. The partnership has three important characteristics: (1) the death or retirement of one partner dissolves the firm; (2) each partner is an agent for the firm; (3) each partner is individually liable for the debts of the firm.

2. *Joint-stock companies.* The joint-stock company is a large partnership in which the interests are represented by shares of stock, as in a corporation. It differs from a partnership in that the death or retirement of a shareholder does not dissolve the company and in that a shareholder is not an agent of the company unless duly elected or appointed as such. It is like a partnership in that each member is individually liable for the debts of the company.

3. *Corporations.* A corporation is a distinct legal entity independent of its stockholders. Partnerships and joint-stock companies are formed by the agreement of the members and require no statutory authorization. A corporation is the creature of statute, and is by statute given a legal being and invested with legal powers as a separate entity. Title to property vests in it, not in its members; it acts through its agents as a legal person; it is liable for its debts and torts, and no liability (unless expressly fixed by statute) rests upon its members. The last feature is highly important. Persons may invest money in a corporation without becoming individually liable for the debts of the corporation, while in a partnership or joint-stock company each partner or shareholder is individually liable.

Statutes, of course, may and often do modify these results. Thus we have full-liability corporations authorized in some states, while we also have limited partnerships in some. In the full-liability corporation each shareholder is individually liable, while in the limited partnership a limited partner is not individually liable beyond a specified amount. In some corporations the statutes make shareholders individually liable to a limited amount. But the type is as stated above.

I. PARTNERSHIPS

138. What constitutes a partnership. A partnership may be general or limited, and partners may be real or ostensible, active or dormant.

1. *General partnerships.* A general partnership is a voluntary association of two or more persons under an agreement to carry on in common, as if one person or entity, a business or occupation, and to share as common owners the profits of the enterprise.

A partnership agreement need not be in writing. It is generally in writing, however, and the document is called the Articles of Partnership (see p. 252 *post*).

The mere sharing of profits is not a conclusive test of the existence of a partnership, although it is strong evidence of it; an agreement to share both profits and losses is still stronger evidence. It is often difficult to decide whether or not a particular agreement constitutes a partnership. In general it may be said that there must be a community of interest in carrying on a business by which each is usually agent for the others and under which there is a division of profits. This is a highly technical subject and it is impossible to treat it here in detail.

Two persons may be partners as to third persons while by force of the agreement between themselves they are not partners as to each other. We are now chiefly concerned with the problem whether they are partners as to third persons.

Examples: 1. A and B agree to carry packages, etc., for hire. A is to furnish horse and cart and to give his services. A is to receive a fixed sum. They are to divide the expenses and to share the profits over and above A's fixed salary. This is a partnership. They are carrying on a business in common with a view to profits. One may in such case be paid specially for services.

2. An owner of a farm let it on shares under an agreement to take one half the products of the farm as rent. This was not a partnership but a lease, with an uncertain and contingent rental.

3. A manufacturer engages an agent to sell goods, agreeing to give him one third the net profits on any sales made by him. This is not a partnership but an agency. The agent does not carry on in common with the manufacturer the business of making and vending the goods.

4. M furnishes capital to start a retail store. N puts in his services in managing the business. They agree to share the profits. This is a partnership. They carry on a business in common with a view to profits.

5. M and N each put in services to carry on in common a law business with a view to profits which they are to share. This is a partnership.

2. *Ostensible partner.* If a man holds himself out as a partner, or permits others to hold him out as a partner, when in fact he is not, he becomes liable as partner to third persons who deal with the supposed firm relying upon this appearance of partnership.

Examples: 6. M and N dissolve partnership. M allows his name to remain over the door of the establishment and upon the letter heads used in the business. X sells goods to the supposed firm believing M to be still a partner. X may hold M liable for the price of the goods. M is estopped by his conduct to deny that he is a partner. He should give notice to former customers of his withdrawal from the partnership.

7. W introduced Y to X as the moneyed partner. Y was not a partner, but he did not deny W's statement. X trusted to this representation and suffered loss. Y is liable. He is estopped to deny that he was a partner. "If a man won't speak when he should, he shan't when he would."

3. *Dormant partner.* A dormant partner is one who is unknown as a partner. He occupies much the same position as an undisclosed principal. He is liable on the firm contracts when discovered, and he is entitled as a partner to the benefit of them.

4. *Limited partnerships.* These exist only by force of statute They are partnerships in which one or more of the partners are not liable for partnership debts beyond the sum each has contributed to the capital. Such partnerships must have at least one general partner whose liability is unlimited. The general partners manage the business, sharing the profits with the limited partners. The statutes prescribe how such a partnership may be formed, and the statutes must be strictly followed; any violation of them will render the concern a general partnership. The theory is that it is a general partnership except so far as the statute duly complied with renders it a limited partnership. These partnerships have never been authorized in England.

5. *Who may be a partner.* Any person who can make contracts may become a party to a partnership contract. By modern statutes married women may make contracts and hence may become partners, although some states do not permit a married woman to become a partner with her husband. Infants may become partners, but the contract is voidable at the will of the infant. So far, however, as an infant has actually put his property into a partnership he cannot withdraw it to the prejudice of creditors. A corporation cannot become a partner unless permitted to do so by its charter.

139. Rights and duties of partners as to each other. Each partner is bound to exercise toward his associates in the partnership the highest good faith. He can make no secret profits.

Examples: 1. A and B are partners in a grocery. A is individually a dealer in sugar. A without B's knowledge sells sugar to the firm at a profit. A must share this profit with B.

2. A, B, and C as partners are lessees of a store. When the lease expires A renews it in his own name. A is held a trustee of this lease for the benefit of the partnership.

Each partner is bound, unless otherwise stipulated, to use due diligence in the conduct of the business, and can claim no compensation except his share of the profits. But if one partner willfully neglects the business and throws all the labor upon another, the active partner may be allowed compensation, at the discretion of a court, upon a final accounting.

Each partner may claim the right to take part in the business and each is entitled to have the business conducted according to the terms of the agreement. No change can be made in the nature of the business and no new partner can be admitted without the consent of each. But as to incidental matters a majority may rule.

If the partnership is for a definite period, a withdrawal of one partner before the expiration of the period, without the consent of the others, is a breach of contract for which they may recover damages. If the partnership is at will, a partner may retire at any time. One partner cannot be expelled by the others. If a partner sells his interest, the buyer gets only the seller's share of such interest as remains after the firm creditors are paid and the partnership is wound up.

Each partner is entitled to an accounting of profits. No action at law can ordinarily be maintained by one partner against the others, but an accounting in equity may be had. If one has paid more than his share of expenses, he is entitled to contribution from the others.

140. Powers of partners. Each partner is an agent for the others in the conduct of firm business, and the partnership is bound by any contract made by a partner within the scope of

his authority. So extensive are the powers of each partner that one ought not to form a partnership with another unless he has the utmost confidence in that other's integrity and judgment. The following are some of the powers possessed by a partner in a trading partnership.

1. To sell or mortgage any personal property belonging to the firm, and even to dispose of the entire stock at one sale; but not to sell real property, because the conveyance must be by all the partners or by one authorized by power of attorney from the others; and not to transfer firm property in payment of his individual debt.

2. To purchase any goods dealt in by the firm or usually employed in such a business, but not other or different goods; a grocery partnership would not carry any implied power to purchase shoes.

3. To receive payment of debts due the firm and give receipts.

4. To make, accept, and indorse negotiable instruments in the name of a trading firm, that is, a firm that buys or sells; but in a nontrading partnership, as a law firm, a hotel firm, or a mining firm, a partner does not possess this implied power.

5. To borrow money on the credit of a trading firm and give security by pledge or mortgage upon the firm property; but not in the case of a nontrading firm.

6. To engage agents and servants for the conduct of the business.

The following are some of the powers which a partner may not exercise without the consent of his copartners.

1. To bind the firm by deed.

2. To bind the firm by a guaranty of his own or another's debt.

3. To bind the firm by a submission to arbitration or by a confession of judgment.

4. To assign the entire firm property to pay the firm debts unless the other partners are inaccessible and the matter is urgent.

After the dissolution of a firm some powers remain in each partner for the purpose of winding up its affairs. A partner

may still sell property and receive and pay debts. He cannot make new contracts or issue negotiable instruments, although he may indorse an instrument "without recourse" in order to sell or collect it.

141. Liabilities of partners. The obligations of a partnership are the joint obligations of its members, that is, the action to enforce it is brought against all jointly. But although the creditor brings an action for his debt against all the members of the partnership jointly and judgment is entered against them jointly, he may satisfy his judgment out of the individual property of one partner, and is not bound to levy upon the joint partnership property. If creditors do exhaust the partnership property, they may then go against the individual property of the partners to make up any deficiency. A partner who thus satisfies a firm debt out of his property is entitled to contribution from his fellow-partners.

An outgoing partner remains liable to creditors for debts contracted while he was a partner unless they release him. An incoming partner is not liable for debts contracted before he became a member of the firm unless he assumes and agrees to pay them.

Partners are liable for torts committed by a copartner or a servant in the course of the firm business. Such liability is joint and several, that is, the action may be against all jointly or against one or against several.

142. Rights and remedies of creditors. A partner may be liable to creditors of the firm of which he is a member and also liable to individual creditors; he has partnership property and also separate property. The problem arises as to the rights of the two classes of creditors in the two classes of property.

1. *Firm creditors.* Firm creditors have a right to have the partnership property applied first to the payment of the partnership debts. An individual creditor of a partner cannot attach the partner's interest in the partnership to the prejudice of the partnership creditors. After the firm creditors are paid the separate creditors of a partner are entitled to any surplus belonging to him.

Examples: 1. A and B, partners in a grocery, purchase flour of X, and A purchases a watch of Y. Y obtains judgment against A for the watch, and levies upon A's interest in the partnership. X afterwards obtains judgment against A and B for the flour and levies upon the partnership property. Y's attachment is not good as against X's. Y can obtain any interest remaining in A after X's judgment is satisfied.

2. In payment for the watch, A turns over to Y a horse and wagon belonging to the firm. If Y knew this was firm property, he cannot hold it against firm creditors. If he took it believing it to be A's, the courts differ as to whether the firm creditors can recover A's interest in it.

2. *Separate creditors.* The weight of authority is in favor of the converse of this rule, namely, that the separate creditors of a partner are entitled to be paid first out of his separate estate. After the separate creditors are paid the partnership creditors are entitled to the surplus.

Examples: 3. A and B, partners, are insolvent. They owe X $15,000. The partnership property is valued at $10,000. A's separate property is valued at $6000 and he owes Y $4000. B has no separate property. Y will be paid in full out of A's separate property. X will get the $10,000 of joint property and the surplus of $2000 from A's separate estate.

4. As above. A and B owe X $7000. A owes Y $14,000. X will be paid in full. Y will get the $6000 from A's separate estate and A's portion of the surplus of $3000 from the joint property after X is paid in full.

These rules are thus stated: The joint estate is applied to the payment of joint debts, and the separate estate to the payment of separate debts, any surplus from either estate being carried over to the other if necessary. But this applies only when there are partnership assets. If there are no partnership assets, the firm creditors share equally with the individual creditors.

143. Dissolution. A partnership may be dissolved in consequence of the happening of any of the following events.

1. By the withdrawal of a partner. If the term is indefinite, a partner may withdraw at will. If the partnership is for a definite period, the withdrawal of a partner before the expiration of the period subjects him to an action for damages, but the partnership is dissolved.

2. The alienation of a partner's interest works a dissolution; but the remaining partner may form a new partnership with the purchaser.

3. The bankruptcy of a partner works a dissolution unless otherwise agreed.

4. The bankruptcy of a firm works a dissolution.

5. The death of a partner works a dissolution unless otherwise agreed. Title to partnership property remains in the surviving partners for the purpose of winding up the partnership. They must first pay the firm debts and then distribute the remainder, accounting to the estate of the deceased partner for his share. They alone sue or are sued upon firm accounts. But if the firm assets are insufficient to pay the firm debts, recourse may be had against the estate of the deceased partner as well as against the estates of the survivors.

6. If the partners are subjects and residents of different countries and their respective countries declare war against each other, this works a dissolution of the partnership.

7. A court may decree a dissolution for the misconduct or insanity of a partner or upon a showing that the business is carried on at a loss.

Upon a dissolution there should be notice to third persons in order that each partner may be protected against further contracts made in the firm name. Special notice should be given to those accustomed to deal with the firm, and general notice, by publication in a newspaper, to the public at large. Existing creditors must be paid before the firm assets are divided.

Surviving partners have power to wind up the affairs of a partnership after dissolution. The representatives of a deceased partner, or an assignee of a bankrupt partner, cannot interfere except to protect the rights of the deceased or bankrupt partner.

The property may be sold if necessary. The good will is a property that should be sold if it has pecuniary value; the purchaser acquires the right to carry on the business under the old name, with himself named as successor to that business.

After firm debts are paid the surplus remaining must be distributed in proportion to the shares or interests held by the respective partners.

II. Joint-Stock Companies

144. How distinguished from ordinary partnerships. Joint-stock companies are large partnerships in which the capital is divided into shares and each partner's interest is represented by his ownership of these shares. Such partnerships are legal at common law, but they have very generally been regulated by statutes.

These companies differ from ordinary partnerships in the following respects.

1. They are not dissolved by the same causes. The shares are transferable. If a shareholder dies, his shares pass to his estate; if he becomes bankrupt, his shares pass to his assignee; if he sells his shares, the transferee succeeds to his rights. There may be the withdrawal of partners and the introduction of new partners without a dissolution of the company.

2. The shareholders do not all participate in the management, but elect directors or other officers who conduct the business. Members who are not officers have no authority to bind the company. The articles of association usually regulate this.

145. How like ordinary partnerships. Joint-stock associations are like ordinary partnerships in the following respects.

1. Each member is personally liable for the debts and contracts of the company. If he sells his shares, he remains liable for debts contracted while he owned them.

2. Unless otherwise provided by statute, all the members must join in an action by the company, and as many as the creditor wishes to hold must be joined in an action against the company. By statute in New York and some other states, such a joint-stock company may sue or be sued in the name of its president, treasurer, or other designated officer representing all the members.

Partnership Agreement

Articles of Agreement, made the first day of May, one thousand nine hundred and one, between George Rice, of the city of Albany, county of Albany, state of New York, and Alfred Post, of the same place,

Witnesseth, as follows:

I. The said parties above named have agreed to become partners in business, and by these presents do agree to be partners together under

and by the name or firm of Rice and Post, at the said city of Albany, in the dry goods business, buying and selling all sorts of goods, wares, and merchandise to the said business belonging. The partnership to commence on the first day of June, 1901, and to continue ten years.

II. To that end and purpose the said George Rice has contributed the sum of five thousand dollars ($5000) in cash, and the said Alfred Post has contributed the lease of the store at 110 Main Street, in the said city of Albany, to be occupied by them, and the stock of goods and good will of the business there heretofore carried on by him, which are together estimated and valued by the parties at the like sum of five thousand dollars ($5000), the capital stock so formed to be used and employed in common between them, for the support and management of the said business, to their mutual benefit and advantage.

III. At all times during the continuance of their partnership they and each of them will give their attendance, and to the utmost of their skill and power exert themselves for their joint interest, profit, benefit, and advantage, and truly buy, sell, and merchandise with their joint stock, and the increase thereof, in the business aforesaid. And they shall and will at all times during the said partnership bear, pay, and discharge equally between them all rents and other expenses that may be required for the support and management of the said business; and all gains, profit, and increase that shall come, grow, or arise from or by means of their said business shall be divided equally between them on the first day of June, September, December, and March, in each year during the continuance of said partnership; and all loss that shall happen to their said business by ill commodities, bad debts, or otherwise, shall be borne and paid between them equally.

IV. And at the end or sooner termination of their partnership the said partners, each to the other, shall and will make a true, just, and final account of all things relating to their said business, and in all things truly adjust the same; and all the stock, as well as the gains and increase thereof, which shall appear to be remaining, either in money, goods, wares, fixtures, debts, or otherwise, shall be divided between them.

In Witness Whereof, the parties hereto have hereunto interchangeably set their hands, the day and year first above written.

In the presence of
Warren Jones.

George Rice.
Alfred Post.

State of New York, }
County of Albany. } ss.

On this first day of May, one thousand nine hundred and one, before me, the subscriber, personally appeared George Rice and Alfred Post, to me personally known to be the same persons described in and who executed the foregoing instrument, and they severally acknowledged to me that they executed the same.

Andrew Johnson,
Notary Public for Albany County, New York.

REVIEW QUESTIONS AND PROBLEMS

Section **137**. What is the object of forming a partnership? What are its chief characteristics? Distinguish a joint-stock company from a partnership. What is the advantage of forming a corporation?

138. Define partnership. How would you determine whether or not a particular agreement constitutes a partnership? What is an ostensible partner? a dormant partner? What are limited partnerships? Who may be a partner?

Problem 1. D loaned a firm (B and C) $2000 to be used in the business, upon an agreement that he was to have one third of the profits. X sold goods to the firm. X sues D as a partner along with B and C. Is D liable to X?

Problem 2. In the above case D is to receive 6% interest in any case, and 15% of the profits in addition. Is D liable as partner?

Problem 3. J. H. has carried on business in his own name and X has dealt with him. He sells out to A and B, who continue the business under the name J. H. & Co. They order goods of X in that name and X supplies them. X does not know that J. H. has gone out of the business. J. H. knows the business is carried on under the name J. H. & Co. Is J. H. liable to X?

Problem 4. D is a dormant partner in the firm of B and C. X does not know this. He sells goods to B and C. D afterwards withdraws. X then sells more goods to B and C. (*a*) Is D liable on the first sale? (*b*) Is he liable on the second?

139. State the duties of a partner toward his fellow-partners. State his rights. Can one partner claim extra compensation? Can one partner withdraw? Can one sue the other at law?

Problem 5. A, B, and C agree to enter into partnership, and A is intrusted with the purchase of a horse. He buys one for $200 but charges it to the firm at $300. In an action for an accounting B and C seek to recover from A $100 as firm money. Result?

Problem 6. A and B are partners, and each is to give his services to the firm business. A becomes ill and all the work devolves upon B. May B claim compensation for this extra labor?

Problem 7. In the above case A neglects the business willfully and refuses to perform any services. B is compelled to manage the whole business alone. May B claim extra compensation?

140. What are a partner's powers? Can he sell real property, and why? Can he make negotiable instruments? Can he borrow money? Can he exercise any powers after the dissolution of the firm?

Problem 8. A and B are partners and owe C $650. A gives C a mortgage in the firm name on the personal property of the firm to secure this debt. Is this binding on B or on the firm A and B?

Problem 9. A gave the above mortgage to secure his individual debt. Does this bind B?

Problem 10. B and C are partners in the conducting of a theater. B borrows money for the business and gives a promissory note in the firm name. Is C bound?

141. State the liabilities of a partner. How is an action brought on a debt against a firm? How is a judgment satisfied? What is contribution? Is an incoming partner liable for debts contracted before he became a member of a firm? How may an action for tort be brought against a firm?

142. State the rule as to the relative rights of creditors of the partnership and creditors of a partner.

Problem 11. A, B, and C are equal partners. The partnership property is worth $10,000. A has $5000 individually, B $4000, and C no assets. The partnership debts amount to $12,000. A's debts amount to $3000, B's to $6000, and C's to $2000. Adjust these sums among the firm and individual creditors.

Problem 12. Same problem if firm debts were only $8000.

143. How is a partnership dissolved? What should be done after dissolution? What interest have the representatives of a deceased partner in a partnership of which the deceased was a member? What is done with a surplus after firm debts are paid?

144. How do joint-stock companies differ from partnerships?

145. How do they resemble partnerships?

CHAPTER XIII

CORPORATIONS

146. Definition and classification. A corporation is an artificial entity created by statute law and endowed with many of the legal capacities of individuals, as the power to take, hold, and convey property, make contracts, sue and be sued, and the like.

It is a legal entity distinct from its members, individually or collectively. It may, for example, sue a member or be sued by a member. It may sue any person without joining its members, and may be sued by any person without joining its members. The title to property vests in it and not in its members. Were all the members to unite in one deed, they could not convey the property of the corporation. It is, within its charter powers, regarded for all purposes as an artificial person, — a distinct member of the business community.

Public corporations are political entities created for governmental purposes, as counties, cities, and the like.

Private corporations are created for the promotion of some interest in which their members are concerned. These fall into two main classes, — stock corporations, which are for private pecuniary gain, and membership or nonstock corporations, which are for a variety of purposes, as clubs, charitable societies, educational institutions, and the like.

Stock or business corporations are those with which we are concerned. They are intended to enable a number of persons to unite their capital in one enterprise with two important results: first, the power to transfer their shares to other holders without affecting the business, and second, an exemption from any personal liability for the debts, contracts, or torts of the corporation. A partnership accomplishes neither of these results. A joint-stock company accomplishes the first but not the second.

147. How a corporation is formed. A corporation is created by legislative grant. Some are created by a special statute which names the corporation and defines its powers, but state constitutions very generally prohibit the legislatures from chartering private business corporations by special act. Business corporations are now usually created under a general statute which permits a number of persons to form a corporation by executing and filing with some designated public official articles of association or incorporation. The certificate contains the name of the corporation, its object, the amount of capital stock, the number of shares into which the capital stock is divided, the place where its principal business office is to be located, the duration of the corporation, the number of its directors with the names and addresses of those who are to serve at the outset, and in some states the names and addresses of the subscribers to the stock with the amount subscribed. Often the statute requires that a specified number of the incorporators shall be citizens of the United States, and a specified number citizens of the state under whose statute the certificate is filed. Some statutes require that the name of an officer or agent upon whom legal process may be served shall also be specified.

The statute under which a certificate is made and the certificate itself constitute together the charter of the corporation and define and limit its powers.

EXAMPLE OF NEW YORK CERTIFICATE

We, the undersigned, all being persons of full age, and at least two thirds citizens of the United States, and at least one of us a resident of the state of New York, desiring to form a stock corporation, pursuant to the provisions of the Business Corporation Law of the state of New York, do hereby make, sign, acknowledge, and file this certificate for that purpose, as follows:

First. The name of the proposed corporation is *Cayuga Manufacturing Company.*

Second. The purposes for which it is to be formed are to manufacture, sell and trade in agricultural implements and machinery.

Third. The amount of capital stock is one hundred thousand dollars.

Fourth. The number of shares of which the capital stock shall consist is one thousand, and the amount of capital with which said corporation will begin business is twenty thousand dollars.

Fifth. The principal business office is to be located in the city of Ithaca, in the county of Tompkins, state of New York.

Sixth. Its duration shall be fifty years.

Seventh. The number of its directors is to be five.

Eighth. The names and post-office addresses of the directors for the first year are as follows:

[Here insert five names and addresses.]

Ninth. The names and post-office addresses of the subscribers, and a statement of the number of shares of stock which each member agrees to take in the corporation, are as follows:

[Here insert names, addresses and amounts subscribed.]

IN WITNESS WHEREOF, we have signed, acknowledged and filed this certificate in duplicate.

Dated this 10th day of January, 1905.

JOHN DOE.
RICHARD ROE.
HENRY FENN.
JOHN S. DALE.
WM. BLACKHEATH.

State of New York, }
County of Tompkins. } ss.

On the 10th day of January, 1905, before me personally appeared John Doe, Richard Roe, Henry Fenn, John S. Dale, and Wm. Blackheath, to me personally known to be the persons described in and who made and signed the foregoing certificate, and severally duly acknowledged to me that they had made, signed and executed the same for the purposes therein set forth.

GEORGE REDBANK, *Notary Public.*

[This is filed and recorded in the office of the Secretary of State, and a certified copy or duplicate original is filed and recorded in the office of the clerk of Tompkins county. Fees are required for filing and recording. An organization tax must also be paid to the State Treasurer.]

148. Members. The members of a business corporation are those who hold its stock; they are called stockholders or shareholders. The relation of stockholders to a corporation and to each other is contractual. At the outset individuals subscribe for shares of stock, that is, contract to take them when issued, and thereby agree to associate themselves as stockholders according to the provisions of the charter and the terms of the subscription. They also agree to pay for the stock when issued

or when payment may be called for. When a stockholder has fully paid for his stock he is under no further liability unless the stock is by statute or contract made subject to assessments.

When a stock certificate has been issued the owner may transfer it and the transferee becomes a stockholder. The transfer is not complete until the new holder's name is substituted on the books of the corporation. It is usual to indorse on the certificate of stock a power of attorney to the new holder to make the transfer. When a certificate is so indorsed with the name of the transferee left blank, the certificate may pass from hand to hand until some holder chooses to insert his name and have the transfer made to him upon the books. But such stock certificates do not have the characteristics of negotiable paper. Infants and others not competent to contract may become transferees and holders of stock in a corporation.

A stock certificate is the written evidence issued by the corporation that the person named in it is registered on the books of the company as the owner of a specified number of its shares of capital stock, each of a certain par value.

FORM OF STOCK CERTIFICATE

No. 38.

No. of shares, 10.
Par value of each, $100.

The Cayuga Manufacturing Company.

This is to certify that John Doe is the owner of ten shares of the capital stock of the CAYUGA MANUFACTURING COMPANY, transferable only on the books of the company by the holder thereof, in person or by attorney, upon the surrender of this certificate properly indorsed.

In Witness Whereof, the said Company has caused its corporate seal to be affixed hereto and this certificate to be signed by its president and treasurer.

Corporate Seal

ITHACA, New York, Jan. 24, 1905.

HENRY FENN, *President.*
WM. BLACKHEATH, *Treasurer.*

FORM OF TRANSFER ON BACK OF STOCK CERTIFICATE

For value received, I hereby sell, assign, and transfer, unto.....
....., ... shares of the within-mentioned stock, and do hereby constitute and appoint.....
.....my true and lawful attorney to transfer the same on the books of the company.

Witness my hand and seal, this.....day of....., 19.....

Witness:

.....(Seal)

149. Directors. In a corporation the members (stockholders) are not as such agents of the corporation. They have the power, however, to elect the directors, who are the ultimate managers of the business and who appoint the necessary active agents and officers.

Directors are elected by a majority vote of the stockholders, each stockholder usually having one vote for each share of stock he owns. It follows that if one person, or a group of persons acting together, owns a majority of the stock, he, or they, can elect all the directors. To avoid this, some statutes provide for cumulative voting. For example, if three directors are to be elected, a stockholder with ten shares may cast ten votes for each of three or may concentrate thirty votes upon one. If there are 1000 shares of stock, and the majority acting together own 740, and the minority 260, the latter by casting triple votes for one candidate would give him 780 votes, or more than the majority casting single votes for each of three could muster. Thus the minority would elect one director and the majority two. The registered stockholder is usually the only one entitled to vote. It is commonly provided that a stockholder may vote by "proxy," that is, authorize another to vote for him.

The powers of the directors are very extensive and are fixed by the charter of the corporation. The directors are, when convened as a board, the embodiment of all corporate powers except

those which must be exercised by the stockholders. They could not change the nature or the purposes of the corporation, increase or decrease its capital stock, dissolve it, or consolidate it with another corporation; these powers are vested in the stockholders. But in the management of the corporation within the limits of the charter powers the directors are supreme.

Directors are bound to exercise reasonable care in the conduct of the corporate business, and may become liable to the corporation for losses resulting from their negligence. Directors also stand in a fiduciary relation to the stockholders, and cannot secure to themselves any advantage at the expense of stockholders.

Statutes often require directors to file annual reports with some public officer, and fix a penalty for failure to do so or for the filing of a false report.

150. Officers and agents. The officers of a corporation are appointed by the directors in conformity with the by-laws. Agents, other than officers, are sometimes appointed by the directors and sometimes by an officer. The general law of agency governs the ostensible powers of such officers and agents, except that third persons are supposed to know the provisions of the charter as to the powers of the corporation itself, and perhaps the provisions of the by-laws as to the powers of the officers. Officers and agents are entitled to compensation, but directors are not unless it is especially voted by the shareholders.

The powers of the officers are usually fixed by the by-laws of the corporation. When the by-laws do not fix the powers, they may be prescribed by the directors.

The president is always a member of the board of directors, and usually presides as its chairman. He is ordinarily empowered to execute contracts, deeds, and other documents, either by general or by special vote of the directors, and is the chief officer in whom is vested the largest measure of authority.

The vice president acts when the president is absent, or, in large corporations, he has some special department of the business confided to him. In large corporations there are often

several vice presidents, known as first vice president, second vice president, etc.

The secretary keeps the records of the meetings of the directors and stockholders. He is also usually the custodian of the seal of the corporation and attaches it to documents requiring a seal; he may also attest the signature of the president to contracts, deeds, etc., although this is more commonly done by the treasurer. He has charge of the transfer of the stock certificates on the books of the corporation, and may be designated as an assistant to the treasurer.

The treasurer is the fiscal agent of the corporation. He has charge of its funds, its bank account, its securities and general assets. The books are kept under his supervision. He usually countersigns the obligations issued by the corporation in the form of contracts, checks, notes, etc., indorses for deposit or collection the checks payable to it, and in general handles its money and negotiable paper.

The general manager is the chief assistant of the president, and the officer with whom persons having business with the corporation generally deal. He usually appoints the subordinate agents and servants, makes contracts for ordinary supplies and the sale of products, and conducts the routine business affairs of the concern. In the case of unusual contracts it is always best to ascertain from the president whether the general manager has authority.

As there are some contracts which even the president cannot make without special authority of the directors, such as the issuing of bonds and notes for borrowing money, the sale of corporate assets and franchises, and the like, it is necessary in cases of doubt to make sure that the act is duly authorized. It is not uncommon for a corporation to repudiate a contract upon the ground that the officer making it exceeded his authority.

151. Powers of a corporation. A corporation as such may be said to possess at the least these necessary powers and qualities:

1. To have a corporate name, as an individual has a name; but once adopted, the name of a corporation can be changed only as prescribed by law.

2. To have a corporate seal.

3. To sue and be sued in its corporate name.

4. To appoint such officers and agents as its business may require.

5. To make by-laws for the management of its business, the transfer of its stock, the calling of meetings, etc.

6. To acquire and dispose of such property in its corporate name or under its corporate seal as may be necessary to its corporate existence or purposes. The amount of real estate it may hold is often limited by law. In the absence of such express restriction, it may hold only what is reasonably necessary. It could not unless expressly authorized engage in real estate speculations.

7. To make such contracts as are reasonably necessary to carry out the purposes for which it is organized. This includes the power to borrow money, give security, and issue negotiable paper, as well as to make the ordinary contracts of sale, agency, etc. But a corporation cannot, unless expressly authorized, enter into a partnership with other corporations or with individuals; nor can it enter into a so-called "trust" in order to create a monopoly or eliminate competition.

8. In general, a corporation may engage in such business as its charter contemplates, and in no other. A partnership may engage in almost any lawful business; but a corporation has no powers except those expressly conferred or those reasonably incident to those expressly conferred. A corporation authorized to manufacture and sell machinery cannot engage in the banking business or the transportation business. Such acts in excess of powers granted are said to be *ultra vires*. It has been held that a railroad company could not run a steamboat beyond its terminus, though it might run one as a ferry to connect its lines. So a steamboat company could not run a railroad, though it might run a short line as a "carry" between two navigable points. Certain powers are regarded as incidental to the express powers, but these do not extend beyond the necessities of the corporate business, and are not to be so broadly construed as to lead the corporation into unauthorized enterprises.

152. Stockholders' rights. Each stockholder has these rights as against the corporation:

1. To have issued to him a certificate of stock representing his interest, and, if he is a transferee, to have the transfer entered on the books of the company.

2. To vote at stockholders' meetings. By the generally prevailing rule each stockholder has as many votes as he has shares of stock. He may exercise his right personally or by proxy. The stockholder of record, that is, the one whose name appears on the books of the corporation, is entitled to vote although he has transferred the stock.

3. To inspect the books of the company when a demand to do so is made in good faith and for a proper purpose.

4. To participate in dividends when the same have been declared. The profits of the corporate enterprise are from time to time divided among the stockholders in the form of dividends, each stockholder getting a per cent upon the face value of his stock. If dividends are about equal to the interest upon normal safe investments, the stock remains at or near par, that is, a $100 share of stock sells for $100. If the dividends are large, the stock goes above par; if small or uncertain, the stock goes below par. If no dividends are paid, the stock may become valueless except for voting purposes and to enable holders to control the corporation.

Profits are what remains after deducting running expenses, improvements, accrued debts, interest on bonds, a fair reserve for depreciation in buildings, machinery, or other equipment, and, perhaps, a sinking fund for the payment of the bonds.

Directors have a large discretion in the matter of declaring dividends, and may add profits to capital instead of distributing them, so long as they act in good faith.

Preferred stock is that upon which it is agreed to pay a fixed rate, practically an interest rate, before any dividends shall be declared upon the common (nonpreferred) stock.

Bonds are promises to pay a principal sum with interest, and are usually secured by mortgage upon the corporate property. Bondholders are simply creditors. A coupon bond is one to

which separate interest coupons are attached for each annual or semiannual interest payment (see p. 179 *ante*).

5. A stockholder in behalf of himself and other stockholders may invoke the aid of a court to restrain the officers from committing a breach of trust, or the corporation itself from engaging in *ultra vires* acts, that is, acts beyond the scope of the charter powers. While the majority rule, they must rule within the limits of the charter powers, and if they exceed these, or if their acts are fraudulent, the minority may obtain an injunction.

153. Liability of stockholders. Stockholders are liable to the corporation for any unpaid portion of their subscriptions. This liability is enforced by an action at law, like any action to collect a debt.

Stockholders are not liable to creditors of the corporation unless the statute or charter provides for some personal liability. But creditors may compel original stockholders who have paid to the corporation less than par value for the stock issued to them to pay the balance if the creditors have been led to believe that stockholders were paying in to the capital stock the full par value. It is a kind of fraud on creditors for a corporation to advertise a capital stock of say $100,000 fully paid in when in fact it issued the stock at forty cents on the dollar, and the capital stock is therefore only $40,000. So also, if the capital stock is fully paid in, but a part of it is thereafter returned to stockholders under the guise of dividends, the creditors may compel the stockholders to refund it so far as necessary to pay the debts of the corporation.

If the statute makes stockholders personally liable for the debts of the corporation, or liable to an amount specified, as, for example, to an amount equal to the face value of their shares of stock, a creditor who has a judgment against the corporation which he cannot satisfy out of its property may proceed against stockholders who were such when his debt was contracted or, as in some jurisdictions, when his action was begun.

154. Reports of corporations. The statutes generally provide that a stock corporation shall make an annual report of its affairs and file the same in some public office where any person may

inspect it. This is in order that persons who may wish to do business with the corporation may ascertain whether it is in a sound and solvent condition. The report usually contains a statement as to the amount of capital stock, the amount actually issued, the amount of the debts, and the amount of the assets. The statutes quite generally make directors personally liable for debts in case they fail to file such a report, and also for debts contracted upon the faith of the report filed in case it is false in any material particular, and sometimes for damages suffered by persons purchasing stock upon the faith of such false report.

155. Receivers of corporations. When a corporation becomes insolvent the court may, upon the petition of the directors, bondholders, or general creditors, appoint a receiver of the property and assets of the corporation. A receiver may also be appointed upon the petition of a stockholder, if the directors are wasting or misapplying the funds or property. A receiver is an officer of the court, and as such takes entire charge of all the property and business pending a dissolution or reorganization of the corporation. The property until final decree is therefore in the custody of the court appointing the receiver.

A "receiver's certificate" is an obligation issued by a receiver under authority of the court for the purpose of raising money to carry on the business of the corporation during the term of the receivership. It takes precedence over all other obligations of the corporation, even its first-mortgage bonds.

156. Dissolution of corporations. A corporation is dissolved by the expiration of the time for which it was chartered.

A corporation may be dissolved by the decree of a court for various causes, among which may be mentioned insolvency, nonuse of franchises, abuse of charter powers, violation of law, and other fraudulent or illegal acts. The directors or stockholders may also apply for permission to surrender the charter whenever they deem such a course beneficial to the interests of the stockholders.

Upon dissolution, after all debts and claims are paid, the remaining assets are divided among the stockholders in proportion to their holdings.

REVIEW QUESTIONS

SECTION **146**. Define a corporation. What is meant by saying it is a "legal entity"? What are public corporations? What are private corporations? What two main classes of private corporations? Object of a stock corporation?

147. How is a corporation created? Explain what constitutes the charter where a corporation is formed under a general act. Draw articles of association to incorporate a stock company to quarry and sell stone.

148. Who are members of a stock corporation? How does membership change? What is a stock certificate? How is it transferred?

149. Who are the directors? How are they chosen? What is cumulative voting and what is its object? What are the powers of the directors? What is their duty?

150. How are corporate officers and agents appointed? Which officers are entitled to compensation? How are the powers of officers fixed? Define the powers of each. What is the ultimate authority in a corporation as to contracts?

151. Enumerate the powers of a corporation. How much real estate may it hold? May it become a partner? What business may it conduct? What are *ultra vires* acts?

152. What are the rights of stockholders? How many votes does each stockholder have? What are dividends? How fixed? What are profits? What is preferred stock? What are bonds? When may a stockholder seek the aid of a court to protect his interests?

153. When is a stockholder liable to the corporation? When is he liable to creditors of the corporation in the absence of statutory liability? What is statutory liability?

154. What reports of corporations are required? What do they contain? Where are they filed? What is the effect if they are not filed or are false?

155. Who is a receiver? Whose agent is he? What are receiver's certificates? Are they more or less valuable than bonds?

156. How may a corporation be dissolved? After dissolution what is done with the assets?

PART VI

PROPERTY IN LAND AND MOVABLES

CHAPTER XIV

REAL PROPERTY

I. Estates in Real Property

157. Meaning of the term "property." Property may be regarded as an object, or as a right or estate in or to an object. It may be corporeal or incorporeal, and it is classified as real and personal.

1. *Property as an object.* The word property is used concretely to designate an object or thing (lands or chattels) in which one may have a proprietary right; it is used abstractly to designate the right, interest, or estate one has in such an object or thing. Property in the legal sense is the right, often but not always exclusive, to possess, enjoy, and dispose of lands and chattels.

As an object of ownership property falls into two classes: (1) immovables or land and things so annexed thereto or connected therewith as to be regarded as a part of the land; (2) movables, or things not so annexed to land as to be considered a part thereof. The first class is popularly called real property and the second personal property; but in the view of the law not all interests in land are real-property interests. It becomes necessary, therefore, to classify the interests which one may have in land into real estate, or real property, and personal estate, or personal property.

2. *Property as an estate.* Real estate, or real property, consists of the estate in land known as a freehold estate because it was that by which the freemen held lands under the old feudal system. This estate is either an estate of inheritance which descends to one's heirs, or a life estate which terminates with the life of the possessor of it or the life of some other designated person. All other estates in land are personal property and are known as estates less than a freehold; they consist of estates for a determinate time, as a leasehold estate for a definite period of years. Mortgages and liens on land are also personal estate.

Real property, then, includes all estates in land except leaseholds and liens.

Personal property includes leasehold estates in land, liens upon land, and all interests in movables.

The terms "real property" and "personal property" are derived not from the nature of the object owned but from the forms of action used by one who had been deprived of possession. If one could recover the thing itself, he used a "real action"; if he could recover only the money value of the thing, he used a "personal action." Hence it came to be said that a thing which could be recovered specifically was a "thing real," or "real property"; while a thing which could not be so recovered, but only damages for its withholding, was a "thing personal," or "personal property." This serves to explain why all interests in land are not real property. These forms of action have disappeared but the names remain to puzzle the student.

3. *Corporeal and incorporeal property.* Property may be corporeal or incorporeal. Corporeal property is tangible and material; incorporeal property is intangible and ideal.

Corporeal real property consists of land and its fixtures; incorporeal real property consists of certain permanent rights of enjoyment or profit in another's land, as a right of way over it.

Corporeal personal property consists of physical movable articles; incorporeal personal property consists of rights granted by government, as a patent right or copyright, and of rights of action against another (known as *choses* in action), as a right to a debt or to damages for a breach of contract, etc. Stock,

bonds, negotiable instruments, and the like are incorporeal personal property.

4. *Lands, tenements, and hereditaments.* Real property is often described as "lands, tenements, and hereditaments." These terms call for definition.

(*a*) Land comprehends the soil and those things annexed to it either by nature or by man, such as waters, trees, ores, houses, fences, etc. The land in contemplation of law extends downward to the center of the earth and upward to the highest heavens. Thus, one owning ten acres of land would have his possession defined by a pyramid with its apex at the center of the earth and with its sides passing through his boundaries indefinitely into space. Any one breaking into this pyramid or "close" at any point is said to be a trespasser.

(*b*) The term tenements is broader than the term land, and includes not only lands but also whatever else could be held under feudal tenure, such as easements in lands. If B owns tract X and C owns tract Y, C may acquire for the benefit of tract Y a right of way over tract X. C therefore owns lands (tract Y) and tenements (right of way over tract X). The modern use of the term "tenement" to describe a building rented to tenants is to be distinguished from this technical meaning.

(*c*) The word hereditaments is the broadest of all, and includes whatever may be inherited by an heir from an ancestor. It includes not only lands and tenements but also heirlooms, such as an historic powderhorn, family jewels, etc. Heirlooms, while common in England, are not known to our law, and therefore hereditaments and tenements are substantially equivalent terms in the United States. Corporeal hereditaments or tenements are things material, such as lands, houses, etc.; incorporeal hereditaments or tenements are intangible rights arising out of material things, such as the right to collect rent out of lands, the right to exercise the franchise to maintain a toll bridge or a ferry, or the right to take ore out of another's land.

5. *Practical differences between real and personal property.* These practical differences once existed, and unless modified by statute still exist between real and personal property.

(*a*) On the death of an owner leaving no will, real property goes to his heirs, while personal property goes to the administrator to pay debts and then to be distributed among the next of kin. The next of kin who take personalty are often different from the heirs who take realty, but modern statutes tend to make the two classes identical. So also statutes often give the realty as well as the personalty into the hands of the administrator.

(*b*) The right of a wife to an estate of dower, or of a husband to an estate by the curtesy, exists in realty but not in personalty.

(*c*) In general, more formality is necessary to transfer realty, as a deed, while personalty may be transferred merely by delivery.

(*d*) The law of the place where realty is situated governs rights in it, while rights in personalty are governed by the law of the place of domicile of its owner.

(*e*) In general, the law as to realty is technical, derived from feudal times, while the law as to personalty is more liberal and modern.

The logical distinction is between movables and immovables. This distinction exists in the nature of things; but the historical distinction based upon estates in lands is fundamental in the English and American law.

158. Estates in land; duration. An estate is the interest which one has in real property. As land is permanent and is not consumed or diminished in the ordinary use of it, there may be different estates in the same parcel of land, one succeeding another in possession and enjoyment. One person may own an estate and have possession and enjoyment, while another also owns an estate but his possession and enjoyment are postponed until the termination of the first estate.

Estates in land are first of all divided into (1) freehold estates and (2) estates less than freehold. The first we have seen are real estate, while the second are personal estate and are often called "chattels real."

1. *Freehold estates.* A freehold estate is one which is to endure for a period not fixed or ascertained, that is, either forever or for a life. Freehold estates are therefore of two kinds: (*a*) estates of inheritance, also called estates in fee; (*b*) life estates, either for the life of the owner or for the life of some other person.

(*a*) *Estates of inheritance* or estates in fee are of two classes: first, estates in fee-simple, which descend to one's heirs generally, collateral heirs as well as lineal heirs; second, estates in

fee-tail, which descend only to one's heirs in the direct line and may be limited to particular heirs, as male heirs, the eldest male heir, etc. Estates in fee-tail have been abolished or modified in many of our states. The estate in fee-simple is the usual estate of inheritance in this country. In order to create it in a deed, the conveyance at common law, and still where not changed by statute, must run to the grantee *and his heirs*, as "to A. B. and his heirs." If it runs "to A. B.," or even "to A. B. and his children," or "to A. B. forever," it would give A. B. only a life estate. This technical rule has been quite generally changed by statutes which provide that a deed "to A. B." shall carry a fee-simple unless a contrary intention appears. In a will the use of the word "heirs" is not necessary to carry a fee, if it appears to be the intent of the testator to devise a fee.

(*b*) *Life estates* are of two classes: first, conventional life estates, or those created by deed or will; second, legal life estates, or those created by law. A life estate of the first class may be for the life of the tenant or for the life of another person (*pur autre vie*). A life estate of the second class may be an estate of dower or an estate by the curtesy. *An estate of dower* is the estate which a surviving wife has during the rest of her life in *one third* of the lands and tenements of which her husband was seised in fee during the marriage, and which she has not released by joining with him in a deed of conveyance or otherwise. Dower has been abolished in some states, and the widow is often given an absolute share instead of a life estate in a third. *An estate by the curtesy* is the estate which a surviving husband has during the rest of his life in *all* the lands and tenements of which the wife was seised in fee during the marriage, provided there was a child of the marriage born alive and capable of inheriting, although the child may have died before the mother. The husband may release this right by joining with the wife in a conveyance. Curtesy has been abolished or modified by statute in many states.

A homestead estate is a creation of statute, and consists in the right to enjoy a certain specified quantity of land occupied as a residence free from liability for debts. It is not strictly an estate, but a right of exemption

attached to an estate. It extends generally to the head of a family, that is, one who is under a legal or moral duty to support those living with him. The amount of land so exempted differs in different states, and in the same state more is allowed in the country than in a city. Some states fix it by area, some by value, and some by both. It is usually provided that a husband cannot transfer a homestead estate without his wife's consent. On the death of a husband the wife in many states succeeds to the homestead right, or even children during their minority. These statutes vary so widely that it would be impossible to consider them here in detail.

2. *Estates less than a freehold.* These estates are also called "leasehold estates" and "chattels real," and are for a fixed or determinable period of time. They are of four classes,—(*a*) estates for years, (*b*) tenancy at will, (*c*) tenancy from year to year, (*d*) tenancy by sufferance.

(*a*) *An estate for years* is an estate limited for a certain definite time, as an estate for one month, or for one year, or for ten years, or for one hundred years. It is usually created by a lease, and hence is often called a leasehold. What remains in the owner is called a reversion, because possession reverts to him upon the termination of the lease. Leaseholds are considered under the subject of Landlord and Tenant (see sec. 175 *post*).

(*b*) *A tenancy at will* is a tenancy which may be terminated at the will of either the lessor or lessee. These are not favored in the law, and wherever possible a tenancy is construed as from year to year instead of at will. Some statutes require a previous notice in order to terminate the tenancy.

(*c*) *A tenancy from year to year* is a tenancy for one week, month, quarter, or year certain, continuing for a successive similar period unless due notice be given to terminate it at the end of the first or any subsequent period. In case of a tenancy for a year continued into a second year, notice of an intent of either party to terminate it is required. The statutes fix this; in some states it is six months, in others three months, etc. In case of a tenancy from quarter to quarter, month to month, or week to week, the notice must usually equal the period in length, being a quarter, a month, or a week respectively.

(*d*) *A tenancy by sufferance* is a tenancy which arises when a tenant remains in possession at the end of his term without

the landlord's consent, as where he has had notice to quit. If the landlord consents to the holding over, the tenancy becomes one from year to year. If he does not consent, he may by proper proceedings have the tenant removed from the land. Most states now have statutes forbidding a forcible entry by the landlord.

The above estates may be thus outlined:

- Estates in land
  - Freehold estates
    - In fee (inheritance)
      - Fee-simple
      - Fee-tail
    - For life
      - Conventional
        - For one's own life
        - For the life of another (*pur autre vie*)
      - Legal
        - Dower
        - Curtesy
        - Homestead
  - Estates less than a freehold, or leaseholds
    - For years
    - At will
    - From year to year
    - By sufferance

159. Future estates in land: reversions and remainders. When an estate for life or for years is created, there is an estate in residue to commence in possession when the life estate or estate for years ends. Such an estate is either a reversion or a remainder.

1. *Reversions.* A reversion is the residue left in the grantor or his heirs after the granting of the lesser estate. It commences in enjoyment only when the lesser estate is ended. Meanwhile it can be freely disposed of and other lesser estates may be carved out of it.

Examples: 1. R leases land to T for ten years. R has a reversion in the land to commence in possession when T's leasehold expires.

2. R afterwards grants L a life estate in the land. R now has a reversion to commence in possession when both T's and L's estates are at an end. L's estate for life is subject to T's leasehold, and can commence in possession only when T's estate is ended. Should L die before T's tenancy expires, the life estate would be of no value.

3. R may sell his reversion and the grantee will get the same rights R had. So also L and T may sell their estates.

2. *Remainders.* A remainder is an estate granted to take effect in possession at the termination of another estate created by the same instrument. The other estate must be less than a fee-simple, for nothing remains to be granted after a fee-simple. A remainder is vested if the person who is to have it is in being and ascertained; it is contingent if the person is not in being or is uncertain, but it becomes vested when such person is ascertained. A vested remainder may be transferred, and if not transferred it will pass to the heir of the remainder-man upon the death of the latter.

Examples: 1. X grants by deed a life estate to L and a remainder in fee to R. R has a vested remainder, and may sell or otherwise dispose of it.

2. X grants by deed a life estate to L with a remainder for life to M and the remainder in fee to R. Here M has a remainder for life after L's death, and R a remainder in fee to be enjoyed in possession after the death of both L and M.

3. X grants a life estate to L with the remainder in fee to L's eldest son. L has no son. The remainder is contingent. If a son be born to L, the remainder is then vested in the son.

4. X grants a life estate to L with the remainder to L's eldest son living at L's death. The remainder is contingent and cannot become vested until L's death, and then only if there be a son of L then living. Should there be none, the estate would revert to X or his heirs.

A grant to L for life with a remainder in fee "to his heirs" was construed at common law to give a fee to L. This is known as the "rule in Shelley's case." This technical rule has been abolished by statute in many states, but as it remains in some it is undesirable to use that phrase to describe the remainder-men.

160. Estates held jointly or in common. Any estate in land may be owned by one person in severalty or by two or more concurrently. The two principal concurrent estates are known as a joint tenancy and a tenancy in common.

Joint tenancy. When two or more persons were granted an estate together by the same instrument, the common law construed the estate to be one in joint tenancy unless the language showed some different intent. The characteristic of the estate was that if one of the persons died the survivors took his share to the exclusion of his heirs or devisees. Many statutes now provide that such an estate shall be a tenancy in common.

Example. X devised by will his farm to his three sons, A, B, and C. This was a joint tenancy. If A died, B and C owned the farm. If B then died, C owned it in severalty. But if A conveyed his interest to D, the joint tenancy was destroyed and it became a tenancy in common by B, C, and D. (A devise or grant to A, B, and C would now in many states be held to create a tenancy in common.)

Tenancy in common. When two or more persons hold undivided interests in land under separate instruments, or under an instrument which shows an intent that each shall hold his interest as a separate or individual one, there is a tenancy in common; and statutes now generally provide that all conveyances or devises to two or more shall be deemed to be tenancies in common unless expressed to be joint tenancies, and that heirs shall take as tenants in common. The characteristic is that on the death of a tenant in common his share goes to his heirs or devisees. The tenancy may be ended by a partition of the estate.

Example. X devises his farm to A, B, and C as tenants in common. Each owns an undivided one third. On the death of one his part will go to his heirs. They may partition the farm so that each will get a definite portion of it in severalty. Should A purchase B's and C's portions, A would own the whole farm in severalty.

Partnership real estate. As a partnership is not a legal entity it cannot take title to real estate, and a conveyance to the partnership would be ineffective for want of a grantee. The title is conveyed to the partners individually, and they become tenants in common, but hold the property subject to partnership debts and to the final accounting among themselves. Upon the death of a partner, title to his share in the realty goes to his heirs, but they hold it practically in trust for the partnership business until that is wound up.

Tenancy by entireties. When an instrument conveys lands to two persons who are husband and wife, they take an estate by the entireties. The characteristic is that whichever survives gets the whole estate, and this result cannot be defeated by a prior conveyance by the deceased party. This estate has been somewhat modified by statute.

Community property. In Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington, whatever is acquired by the labor or efforts of either a husband or his wife after the marriage belongs one half to each. This does not include property owned at the time of the marriage, or property received by way of gift, devise, or descent.

This idea came through the civil (modern Roman) law at a time when the Spanish or the French owned the territory from which these states were carved.

161. Equitable estates: trusts. It is also possible to divide the estates in land so that one person has the recognized estate and title in a law court and another person in an equity court, and thus create what are known as trusts. A trust is the obligation enforced in an equity court against the holder of the legal title to property (the trustee) to account to another person (the beneficiary) for the income and profits of the property.

Example 1. X devises lands to T to receive the rents and income and pay the same to B during B's life, and then to convey to C. T has the legal title in fee-simple. B has an equitable life estate and C has an equitable fee in remainder. No one could disturb T's title in a law court; but in an equity court B and C may compel him to perform the trust. When B dies there must be a conveyance to C, who will then have the legal title.

A charitable trust is one created for the benefit of the public or of an indefinite number of persons constituting a class of the public. Such trusts are enforced by a public officer, usually the attorney-general of a state.

Example 2. X conveys land or other property to T (and his successors to be named by the court), to receive the rents and profits and apply the same to the relief of the poor of the city of A, or to the maintenance of a school, or to maintain a public park, etc.

II. LAND: ITS CONSTITUENTS, GROWTHS, AND FIXTURES

162. Extent of ownership: soil, air, minerals, waters. When one owns land he controls the space above and below it. If limbs of trees project into the air above his land, he may cut them off to the boundary line. If roots grow into his soil from an adjoining estate, he may cut them off. He owns all the minerals in the land, including mineral oils and gases, subject only to any reserved right in the state. In England all gold and silver mines belonged at common law to the king, but in this country such rights are in the landowner. Congress has

provided by legislation for the establishment of mining claims in public lands.

A lode or vein (a line of metal imbedded in quartz or rock) may be located to the extent of 1500 feet in the direction in which it runs, and 300 feet on each side. A placer (ground containing mineral in earth, sand, or gravel in a loose state) may be located by one person to the extent of 20 acres, or by eight persons in association to the extent of 160 acres. The locator of a claim must do work thereon at least to the extent of $100 in each year, or he forfeits his claim.

One owns the waters if he owns the land under them, except that in flowing streams he cannot unreasonably divert the waters to the damage of a lower owner. If he owns the waters, he owns the ice formed on them. Lands under navigable waters generally belong to the state. This is almost invariably true as to tide waters, but states differ as to the ownership of the lands under navigable streams. In the case of lakes the larger ones generally belong to the state, while smaller ones belong to private persons. If one owns the fee under waters, he has the exclusive right to fish in such waters.

163. Vegetable products. Vegetable products are divided into two classes.

1. *Fructus naturales.* Vegetable products that are not the result of annual labor and fertilizing are classed as perennials, or *fructus naturales*. Such are trees, bushes, and grasses. Some perennials, as hops, have been excluded because the crop is dependent upon annual cultivation. Fruit upon trees and bushes has usually been included, although often the result of annual cultivation. *Fructus naturales* are regarded as a part of the realty.

2. *Fructus industriales.* Vegetable products that are the result of annual labor and fertilization are classed as *fructus industriales*, or emblements. Such are grains, vegetables, and other annual crops. These are regarded as personalty and not as a part of the realty. If one has an estate of uncertain duration, and it is terminated before the crops he has planted have ripened, he or his representatives may enter and cultivate and gather the crops. But if his tenancy is for a definite period, he

cannot enter after the tenancy expires. If the owner of a fee dies while crops are ripening, they go to his executor and not to his heir. Growing crops are personalty, and hence a sale of them falls within the seventeenth section of the Statute of Frauds, while a sale of growing perennials falls within the fourth section, although on the last point there is some conflict and confusion in the decided cases.

3. *Border trees.* A tree growing on the boundary line between the lands of different owners is owned by them as tenants in common. Neither can lawfully move or destroy it as a whole; but one may cut the branches on his side if he does not injure the trunk. If the trunk is wholly on one side of the boundary, the tree belongs to that landowner; the other landowner may cut off the overhanging branches but cannot appropriate them or the fruit on them.

164. Fixtures. A fixture is an article which, originally personal property, has by annexation to land come to be regarded as realty. It is often a nice and difficult question whether or not the article so annexed has become a fixture and so ceased to be personalty.

This question often arises between a vendor and a vendee of lands, between a mortgagor and a mortgagee of lands, between the heir or devisee of a landholder and his executor, between the reversioner or remainder-man and the tenant for years or the executor of a tenant for life, between the mortgagee of the owner's lands and the mortgagee of his personalty, between the landowner and a judgment creditor who levies on the article as personalty, etc. The question usually is, however, whether one who is taking possession of the land may hold the article as a part of the realty, or whether the one who is quitting the land, or his representatives, may sever the article and take it as personalty.

While the matter is a complicated and tangled one, the following rules will serve as a fairly reliable guide through the labyrinth.

1. In order to be in any event classed as a fixture the article must be physically annexed to the land or to some structure or thing itself physically annexed.

Exceptions. (*a*) If the article is an essential part of an annexed article, it may be a fixture, although itself a movable, as an adjunct or part of a

machine, or the keys to a house. (*b*) If the article is of great weight and is kept in place by gravity without actual physical attachment, it may be a fixture, as a building, or a machine, or a colossal statue. (*c*) If the article has been fitted and appropriated to a purpose which when carried out would make it a fixture, it may be constructively a fixture, as fence rails laid along a line for a fence begun but not yet finished.

2. If the article is so annexed that to remove it would materially injure what remains or destroy the article itself, it must be regarded as a fixture and irremovable.

Example 1. Water and gas pipes built into a house are so annexed that they cannot be removed without tearing out floors or partitions. But if simply attached to walls or floors by hooks, they might be removed under 3, (*b*).

3. If the article may be removed without injury to the freehold or destruction of the article itself, then whether it is or is not regarded as a fixture often depends upon the relation of the one who annexed it to the land.

(*a*) If the annexer is the owner in fee of the land, and the article is calculated to improve the land, then the article becomes a fixture. If the owner sells or mortgages the land, the fixture goes with it. If the owner dies, the fixture goes to the heir or devisee and not to the executor. Of course the owner, while he is owner, may sever the article and make it again personalty, or he may by express stipulation reserve it from a sale or mortgage, or he may by will direct it to be severed and treated as personalty.

Example 2. Buildings, fences, machinery attached to a structure, furnaces and steam-heating apparatus, bars and counters in business structures, bookcases attached to the walls, paintings on canvas cemented to the walls, heavy stone statues, and the like have all been held to be fixtures. But gas fixtures, such as chandeliers, have been held to be removable furniture.

(*b*) If the annexer is a tenant of the land, and the annexation was for purposes of trade or domestic convenience, the article may be removed by the tenant at the expiration of the term. The law favors the tenant in adapting the land and structures to the use to which he wishes to put them during the tenancy,

and permits him to remove annexations if he can do so without too serious an injury to what remains. He must exercise this right before he surrenders possession. If he renews his lease, he should in the new lease expressly reserve the right to remove articles annexed under the former lease or, according to some authorities, he abandons them as fixtures.

Example 3. Buildings not let into the soil, engines, boilers, and other machinery of trade, counters, cases of shelving and other store furniture, chairs fastened to the floor of a theater, gas fixtures, and the like have all been held to be removable by a tenant. The limit would be fixed when the removal would do a serious injury to the building belonging to the landlord, and upon this test many of the above articles have been held to be fixtures even as between landlord and tenant. Moreover, courts differ sometimes even upon substantially the same facts.

III. Relative Rights of Adjoining Owners

165. Fences: cattle trespass. At common law the owner of cattle is bound to fence them in or otherwise restrain them. The owner of crops is not bound to fence against trespassing cattle. Statutes have in many states changed or modified these rules, and in some the matter is left to local authorities to regulate. Very generally, however, statutes have imposed upon railroads the duty of fencing their property so as to avoid injury to trespassing cattle.

In many states there are statutes compelling adjoining owners to maintain a partition fence at their joint expense.

166. Air and waters; support of land. One owner is not permitted to pollute the air over a neighbor's land by smoke, dust, or odors in a manner unreasonably to disturb the neighbor's enjoyment of his property. Neither can he unreasonably disturb it by noises or vibrations. These acts constitute a nuisance for which damages may be recovered or an injunction issued.

One owner cannot pollute waters flowing from his land to that of a neighbor, nor unreasonably divert the waters or appropriate them.

One owner cannot remove the lateral support of a neighbor's land by digging so near the boundary as to cause the neighbor's

land to cave in. This does not extend to the support of buildings but only of the land in the natural condition. But one excavating may be liable for negligence or for want of notice if another's building is injured thereby.

167. Easements. An easement is a right by one person to do or to compel another to refrain from doing some act on that other's land. It may be acquired by grant or, in some cases, by prescription, — that is, by the adverse use of the right for a specified period, usually twenty years.

One cannot by prescription acquire a right to have light and air come to his land from his neighbor's land, but he may by grant. Thus, A buys land of B, and the latter agrees not to build nearer the line than twenty feet. This gives A an easement to that extent in the light and air from B's land.

One may by prescription or by grant acquire a right of way over another's land. If one sells to another land not adjoining a highway, there is a "way of necessity" over the seller's remaining land in order to reach the highway.

One may acquire a right to use a party wall, or to drain water, or to take water, or to compel another to maintain a partition fence, and the like. All these are easements.

A highway over one's land is an easement for the benefit of the public generally, who acquire thereby a right to pass to and fro. Of course the public may, and sometimes does, own the fee also. But if the fee remains in a private individual, he may use it for any purpose not inconsistent with the right of the public. He is entitled to the vegetable growth, and he may forbid others to cut trees or grass, or pasture cattle, or hunt or fish there.

IV. Transfer of Interests in Lands

168. Contract of sale. A contract to sell lands or any interest in lands must be in writing and be signed by the party to be charged (see sec. 22). While the writing may be an informal instrument (a memorandum), it is usual to have a somewhat formal one setting out the terms of the agreement in full. It should be signed by both parties in order that both may be held.

The legal title does not pass at the time of making the contract, as it does in the case of the sale of personal property. But equity for many purposes regards the title as having passed to the vendee from the time the contract is made, although payment and delivery of the deed are postponed. As equity regards the vendee as the true owner, it will compel the vendor to execute the conveyance by what is known as specific performance of contract.

Equity regards the land as already a part of the vendee's realty, so that if he dies his heir can compel his executor to pay for it out of the personalty, and the deed from the vendor will be made to the heir; it regards the unpaid purchase price as a part of the vendor's personalty, and the money when paid will go to the vendor's executor in case the vendor has died.

Since equity regards the land as that of the vendee he must bear the loss if buildings burn, and cannot escape paying the purchase price on that account. But at law the risk will follow the legal title and the loss from destruction of buildings will fall on the vendor.

169. Conveyances. Conveyances of interests in lands other than leases are by deed. Of these there are two kinds, — quitclaim deeds and warranty deeds.

A quitclaim deed conveys whatever title the grantor may have, and throws upon the grantee the risk as to whether there is a good or bad title or no title at all.

A warranty deed conveys the title of the grantor, and he covenants or warrants (*a*) that the grantor is seised of the lands and has the right to convey them; (*b*) that they are unincumbered unless otherwise stated; (*c*) that the grantee shall have quiet enjoyment, that is, shall not be evicted by any superior title; (*d*) that the grantor will warrant and defend him in this; (*e*) that the grantor will execute any further instrument necessary to perfect the grantee's title.

Many states provide by statute for a short form of deed which shall be deemed to carry with it all these warranties.

A deed must be signed by the grantor and, unless otherwise provided by statute, must be sealed; in some states it must also be witnessed. In order to be recorded it must be acknowledged before a notary or other authorized official. Recording

Articles of Agreement, Made this ninth day of June in the year One thousand nine hundred and two

Between Edward Baker of the city of Binghamton, County of Broome, State of New York, of the first part, and Nelson Hopkins of the City of Syracuse, County of Onondaga, State of New York, of the second part, in the manner following: The said parties have and hereby do mutually covenant and agree as follows: The *part y* of the first part to sell, and the *part y* of the second part to purchase, **All that Tract or Parcel of Land,** situate in the City of Binghamton County of Broome and State of New York, briefly described as follows: Beginning at a point one hundred (100) feet east of the northeasterly corner of Ashland Avenue and Summer Street, on the northerly line of Summer Street, and running thence northerly and parallel with Ashland Avenue one hundred and fifty (150) feet; thence easterly and parallel with Summer Street forty (40) feet; thence southerly and parallel with Ashland Avenue one hundred and fifty (150) feet; thence westerly along the northerly line of Summer Street to the place of beginning,

for the sum of twelve thousand Dollars ($ 12,000.00), which sum the said *part y* of the second part hereby *agree s* to pay to the *part y* of the first part as follows: six thousand dollars ($6,000.00) on the first day of July, 1902, and six thousand dollars ($6,000.00) on the first day of January, 1903.

Said *part y* of the second part also *agree s* to pay ALL taxes and assessments which shall be taxed or assessed upon said premises from the date hereof until the said sum shall be fully paid as aforesaid.

And the said *part y* of the first part, on receiving such payment at the time and in the manner above mentioned, shall, at his own proper cost and expense, execute and deliver to the said *part y* of the second part, or to his assigns, a warranty deed, for the conveying and assuring to him, or them, the fee simple of the said premises.

It is agreed that the *part y* of the second part shall have possession of said premises from and after the first day of July, 1902.

And it is agreed that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators and assigns of the respective parties.

In Witness Whereof, The said parties have hereunto set their hands and seals the day and year first above written.

In Presence of
John Stowe

Edward Baker SEAL

Nelson Hopkins SEAL

[Acknowledgment by both parties (see p. 253). The contract is good without an acknowledgment, but could not be recorded.]

is necessary in order to prevent a subsequent sale to an innocent purchaser. The deed must be delivered to the grantee; usually this is a manual delivery, but less than this has been held to be sufficient where the intention was clear. A delivery in escrow is a delivery to a third person upon condition that the deed shall not take effect until some condition is fulfilled. An agent duly authorized by power of attorney may execute and deliver a deed for his principal (see sec. 119).

If a deed is made by a married man, it is usual to have his wife join in it; otherwise, should she survive him, she could claim her right of dower in the property conveyed. If a deed is made by a married woman, her husband should join in it in order to bar his possible estate by the curtesy. If property is owned jointly, the owners may convey by joining in one deed.

A deed consists of the following parts: (1) the premises, containing the names of the parties, sometimes the date though this may be at the end, a statement of the consideration and of its payment, the words of conveyance, and the description of the land; (2) the habendum or statement of the estate granted, beginning often but not always with the words "To have and to hold"; (3) any reservation that is to be made; (4) the covenants or warranties; (5) the conclusion, containing the statement that the grantor has signed and sealed, together with his signature and seal and the signatures of the witnesses, if any; (6) the acknowledgment before a notary of the due execution of the instrument.

170. Wills. Property may be transferred by will. In order that a will shall be valid it must be signed (in some states subscribed) by the testator and his signature attested by two or more witnesses. In some states the testator must actually sign in the presence of the witnesses and they in his presence and in the presence of each other. In many states one who is named as a beneficiary in the will and also signs it as a witness cannot take the devise or bequest; hence it is important that the witnesses should not be interested in the will.

As a will does not take effect until the death of a testator, a devise or bequest lapses if the donee dies before the testator,

This Indenture,

Made the first day of April in the year One thousand nine hundred and five

Between Charles Lewis

of the City of Syracuse, County of Onondaga, and State of New York,

of the first part, and

Walter Cooke

of the same place, of the second part,

Witnesseth, That the said *party* of the first part, in consideration of the sum of six thousand dollars ($6,000.00), lawful money of the United States, paid by the *party* of the second part, *do* es hereby grant and release unto the said *party* of the second part, his heirs and assigns forever,

All that Tract or Parcel of Land, situate in the City of Syracuse County of Onondaga and State of New York, situate, lying and being in the tenth ward of the city of Syracuse, and known as lot numbered three hundred and thirty (330) on a "Map of Land in the city of Syracuse lying between Tenth and Twentieth Streets" and filed in the County Clerk's office of Onondaga County on the tenth day of June, 1899, bounded and described as follows, viz.: Commencing on the northwesterly corner of First Avenue and Thirteenth Street and running thence northerly along the westerly side of First Avenue forty-three (43) feet, thence westerly and parallel with Thirteenth Street eighty (80) feet, thence southerly and parallel with First Avenue forty-three (43) feet to the northerly side of Thirteenth Street, and thence easterly along the northerly side of Thirteenth Street eighty (80) feet to the place of beginning.

Together with the appurtenances, and all the estate and rights of the said *party* of the first part in and to said premises. **To Have and to Hold** the above granted premises unto the said *party* of the second part, his heirs and assigns forever.

And the said Charles Lewis, party of the first part, *do* es covenant with the said *party* of the second part as follows:

First. — That the *party* of the first part —— is —— seised of the said premises in fee simple, and *has* good right to convey the same.

Second. — That the *party* of the second part shall quietly enjoy the said premises.

Third. — That the said premises are free from incumbrances.

Fourth. — That the *party* of the first part will execute or procure any further necessary assurance of the title of said premises.

Fifth. — That the said Charles Lewis, party of the first part, —— will forever warrant the title to said premises.

In Witness Whereof, The said *party* of the first part *has* hereunto set —— his —— *hand* and *seal* the day and year first above written.

In Presence of
George Rose

Charles Lewis (SEAL)

State of New York,
County of Onondaga
City of Syracuse } ss.

On this —— first —— day of —— April —— in the year One thousand nine hundred and five —— before me, the subscriber, personally appeared —— Charles Lewis ——
to me personally known to be the same *person* described in and who executed the foregoing instrument, and *he* —— acknowledged to me that *he* executed the same.

{ NOTARY'S SEAL }

William A. Peterson
Notary Public for Onondaga County, New York.

[A quitclaim deed would read like the above except that it would say "does hereby remise, release and forever quitclaim unto the said party," and would omit the warranties. A deed may be a gift, that is, the grantee may pay nothing. In such case it is usual to say "in consideration of one dollar to me in hand paid, and other good and sufficient consideration."]

unless, as in some states, the statute provides who shall take in that event. In case a devise of land lapses by the death of the devisee it will go to the testator's heirs, unless there be a residuary devise ("all the rest of my property to ——"), in which case in most states it will pass to the person named in the residuary clause, but in some it will even then go to the heir.

At common law the marriage of a woman after making her will revokes the will; but this has to some extent been changed by statutes. The marriage of a man after he makes his will, followed by the birth of a child, revokes his will; but this also has been in some states modified or regulated by statute. If a child is born after the will of a married man or woman is made, and there is no provision in the will for such after-born child, most states provide that the child shall take what would have descended to him had the parent died without a will.

In most states a person may not make a valid will of real property until he is twenty-one. This is also frequently so as to a will of personalty, but some states permit a will of personalty at eighteen. A person of unsound mind cannot make a valid will. The law of wills is so much a matter of statute that local legislation must be consulted in order that the necessary formalities may be observed and the intention of the testator consummated. It is not prudent for a person to make his will without good legal advice.

171. Descent to heirs. If an owner of real property dies without a will, the real estate (that is, any estate of inheritance) goes to the persons designated by law as his heirs, subject to the estate of dower or curtesy in a surviving wife or husband. The statutes provide who shall be deemed heirs. They are usually the following: first, children and the children of a deceased child, the latter taking among them the share which their parent would have taken had he lived; second, if there be no lineal descendant, the father is generally named as the heir; third, if there be none of the above, the mother, brothers, and sisters, and descendants of deceased brothers and sisters; fourth, failing these, the land goes to collateral relatives beginning with the uncles and aunts on the father's side and their

Will

I, James Brown, of the City of Ithaca in the County of Tompkins and State of New York, being of sound mind and memory, do make, publish and declare this my last Will and Testament, in manner following, that is to say:

First. — I direct that all my just debts and funeral expenses be paid.

Second. — I give and bequeath to my son, William Brown, five thousand dollars ($5,000.00).

Third. — I give and bequeath to the Home Orphan Asylum of New York city three thousand dollars ($3,000.00).

Fourth. — I give, devise and bequeath to my daughter, Mary Brown, my farm in the town of Dryden, county of Tompkins, state of New York, known as "Oakdale," for and during the term of her natural life, and after her death to her lawful issue her surviving.

Fifth. — I give, devise and bequeath to my wife, Elizabeth Brown, all the rest, residue and remainder of my estate, both real and personal, in lieu of her right of dower.

Lastly, I hereby appoint Henry Wilson executor of this my last Will and Testament: hereby revoking all former wills by me made.

In Witness Whereof, I have hereunto subscribed my name the tenth day of June, in the year of our Lord one thousand nine hundred and four.

James Brown.

We whose names are hereto subscribed do certify that on the 10th day of June, 1904, James Brown, the testator, subscribed his name to this instrument in our presence and in the presence of each of us, and at the same time, in our presence and hearing, declared the same to be his last Will and Testament, and requested us, and each of us, to sign our names thereto as witnesses to the execution thereof, which we hereby do in the presence of the testator and of each other, on the said date, and write opposite our names our respective places of residence.

George Davidson *residing at* Ithaca, New York.

Charles Edwards *residing at* Ithaca, New York.

descendants. There are many variations in the statutes, and only a general notion of them can be here given.

If an owner of personal property, including leasehold estates in land, dies without a will, the property goes to his administrator to pay debts, and is then distributed among the persons designated by statute as next of kin. These statutes are much like those defining heirs, except that a widow is usually given a considerable portion of the personalty absolutely, say one third if there be children, and one half, or often more, if there be no children or grandchildren.

172. Adverse possession. One may lose and another gain title to real property by adverse possession. This is an open, exclusive, and continuous possession hostile to the true owner for a period of time, usually twenty years, which by statute bars the right of the true owner to bring an action to recover the possession. Residing on the land, cultivating it, or fencing it may be enough to show adverse possession. A tenant or other person holding under the owner could not get adverse possession.

V. Mortgages and Liens

173. Mortgages of real property. A mortgage is in form a conveyance of the title to lands, with a defeasance clause stating that in case the mortgagor pays to the mortgagee a certain sum to secure which the mortgage is given, the conveyance shall be null and of no effect. It is a form of giving security for a debt by creating a lien on land, and is executed, acknowledged, and recorded like a deed. If it is not recorded, a subsequent mortgage taken without notice of the first and duly recorded would take precedence, or one purchasing the land without knowledge of the mortgage would get the land free from the lien.

The debt to secure which the mortgage is given is usually evidenced by a note or bond. The debt and the mortgage which secures it may be assigned. The assignment is formally executed and also recorded.

When the mortgage is paid a formal discharge or satisfaction is executed by the mortgagee or his assignee, and is also recorded.

This Indenture,

Made the third day of October in the year One thousand nine hundred and one

Between Thomas Powers
of the City of Rochester, County of Monroe, and State of New York,
part y of the first part, and George Hatch
of the same place, *part* y of the second part.

Whereas, the said Thomas Powers
is justly indebted to the said *part* y of the second part in the sum of six thousand Dollars ($6,000.00), lawful money of the United States, secured to be paid by his certain bond or obligation, bearing even date herewith, conditioned for the payment of the said sum of six thousand Dollars ($6,000.00) on the first day of November, nineteen hundred and three, and the interest thereon, to be computed from this date at the rate of five per centum per annum, and to be paid semiannually on the third days of April and October in each and every year until the whole of said principal sum be fully paid, with the privilege to the party of the first part, his executor, administrator or assigns, on any day when interest is payable, to pay off the principal of said mortgage in sums of one thousand dollars or more.

Now this Indenture Witnesseth, That the said *part* y of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, and also for and in consideration of one dollar paid by the said *part* y of the second part, the receipt whereof is hereby acknowledged, do es hereby grant and release unto the *part* y of the second part, and to his heirs (or successors) and assigns forever,

All that Tract or Parcel of Land, situate in the City of Rochester County of Monroe and State of New York, bounded and described as follows, viz.: Beginning at a point in the northerly line of Forest Avenue three hundred and twenty-three (323) feet easterly from the easterly line of North Street; running thence easterly along said line of Forest Avenue three hundred and seventy (370) feet; thence northerly two hundred and fifty-two (252) feet; thence westerly and parallel with Forest Avenue three hundred and seventy (370) feet; thence southerly two hundred and fifty-two (252) feet to the place of beginning.

Together with the appurtenances, and all the estate and rights of the *part* y of the first part in and to said premises.

To Have and to Hold the above granted premises unto the said *part y* of the second part, his heirs and assigns forever.

Provided Always, That if the said *part y* of the first part, his heirs, executors or administrators, shall pay unto the said *part y* of the second part, his executors, administrators or assigns, the said sum of money mentioned in the condition of the said bond or obligation, and the interest thereon, at the time and in the manner mentioned in the said condition, then these presents, and the estate hereby granted, shall cease, determine and be void.

And the said *part y* of the first part *covenant s* with the *part y* of the second part as follows:

That the *part y* of the first part will pay the indebtedness as hereinbefore provided, and if default be made in the payment of any part thereof, the *part y* of the second part shall have power to sell the premises herein described, according to law.

In Witness Whereof, The said *part y* of the first part *ha s* hereunto set his hand and seal the day and year first above written.

In Presence of
William Johnson

Thomas Powers SEAL

State of New York,
County of Monroe } ss.
City of Rochester

On this third day of October in the year One thousand nine hundred and one before me, the subscriber, personally appeared Thomas Powers to me personally known to be the same *person* described in and who executed the foregoing instrument, and *he* acknowledged to me that *he* executed the same.

NOTARY'S SEAL

Henry J. Stephenson
Notary Public for Monroe County, New York.

[If Thomas Powers were a married man, it would be unsafe for Hatch to take the mortgage unless the wife of Powers joined in it, because a foreclosure of Powers' interest would not affect the right of the wife to dower in case she survived her husband.]

This Instrument, Made this third day of April, 1903,
Between George Hatch, of the City of Rochester, County of Monroe, and State of New York, of the first part, and Albert Jones, of the City of Ithaca, County of Tompkins, and State of New York, of the second part,

Witnesseth, That the *party* of the first part, for a good and valuable consideration to him in hand paid by the said *party* of the second part, *has* sold, assigned, transferred and conveyed, and *does* hereby sell, assign, transfer and convey to the *party* of the second part a certain mortgage bearing date the third day of October, 1901, made by Thomas Powers to George Hatch, said party of the first part, to secure the payment of the sum of six thousand Dollars ($6,000.00), and interest thereon from the date thereof, recorded in the Clerk's office of Monroe County, State of New York, in Liber 456 of Mortgages, at page 141, on the third day of October, 1901, at two o'clock P. M., together with the bond accompanying said mortgage and therein referred to, and all sums of money due and to grow due thereon. And the *party* of the first part hereby *covenants* that there is now due on said bond and mortgage the sum of four thousand dollars ($4,000.00).

In Witness Whereof, The said *party* of the first part *has* hereunto set his *hand* and *seal* the day and year first above written.

George Hatch SEAL

[L.S.]

State of New York,
County of Monroe } ss.
City of Rochester

On this third day of April in the year One thousand nine hundred and three before me, the subscriber, personally appeared George Hatch to me personally known to be the same *person* described in and who executed the foregoing instrument, and *he* acknowledged to me that *he* executed the same.

NOTARY'S SEAL

John J. Darst
Notary Public for Monroe County, New York.

Discharge of Mortgage

State of New York
County of Tompkins
City of Ithaca
} ss.

I, Albert Jones, of the City of Ithaca, County of Tompkins, and State of New York,

Do Hereby Certify, That a certain Indenture of Mortgage, bearing date the third day of October in the year One thousand nine hundred and one made and executed by Thomas Powers, of the first part, to George Hatch, of the second part, and recorded in the office of the Clerk of the County of Monroe, State of New York, in Liber 456 of Mortgages, page 141, on the third day of October, 1901, at two o'clock P. M., which said mortgage was duly assigned to me by the said George Hatch, the mortgagee above named, by assignment dated the third day of April, 1903, and recorded in the Clerk's office of Monroe County, State of New York, in Liber 460 of Mortgages, at page 210, on the third day of April, 1903, at four o'clock, P.M., is, together with the bond secured thereby, fully paid, satisfied and discharged.

Dated the tenth day of February 1905.

Albert Jones SEAL

State of New York,
County of Tompkins
City of Ithaca
} ss.

On this tenth day of February in the year One thousand nine hundred and five before me, the subscriber, personally appeared Albert Jones to me personally known to be the same *person* described in and who executed the foregoing instrument, and *he* acknowledged to me that *he* executed the same.

NOTARY'S SEAL

Joseph Paul
Notary Public for Tompkins County, New York.

If the mortgage is not paid when due, the mortgagee or assignee may foreclose it and sell the land to pay the debt, interest, and costs, any residue above this going to the mortgagor. The mortgage may give a power of sale without requiring the mortgagee to resort to a judicial proceeding for foreclosure. If the land does not sell for enough to pay the debt, a judgment may be had against the mortgagor for the deficiency in case he has also given a note or bond or has undertaken a personal liability.

174. Liens on real property. In some states an unpaid vendor of land has a lien on the land for the unpaid purchase money.

In many states one who makes improvements on lands believing them to be his, and who is afterwards ejected by one having a better title, is allowed a lien on the lands for the betterments.

Statutes often provide for a lien in favor of unpaid mechanics who have performed labor upon buildings, or in favor of those who have furnished material for them.

A judgment against a person rendered in a federal court is a lien on all the lands of the judgment debtor situated in the state in which it is rendered. A judgment in a state court is a lien on the lands of the judgment debtor situated in any county of that state in which such judgment is docketed.

In most states taxes on a particular piece of land constitute a lien on the land until paid.

Before purchasing land one should have all the records carefully searched in order to ascertain whether the vendor's title is good and whether any liens are recorded against the property. An abstract of title is usually furnished by the vendor showing all instruments of record affecting the title; this should be examined by the vendee's attorney, and his certificate that it discloses a good title should be attached.

VI. Landlord and Tenant

175. The lease and its covenants. Estates for years have already been explained (see sec. 158). The relation of landlord and tenant or lessor and lessee is created by a lease, which

conveys an estate for years to the tenant and leaves a reversion in the landlord. By the Statute of Frauds all leases for more than a specified number of years must be in writing; in many states the specification is three years, but in some it is one year. A lease need not, however, be under seal.

The estate in the lessee is not created until he enters under the lease, — that is, he could not bring an action as owner of an estate, — although he has, of course, his contract right against the lessor for a refusal to allow him to take possession, and is himself liable as for rent if he refuses to enter. When he enters he has thereafter the exclusive right to possession during the life of the lease, and may maintain an action against any one who injures the property. If the wrongdoer also injures the reversion, the landlord may have his action as well.

A lease is in form a conveyance of lands for a term of years or at will, in consideration of a return of rent or other recompense. The person conveying is called the lessor, and the person receiving the conveyance is called the lessee. The words of conveyance are usually "grant," "demise," "lease," "let," but any words expressive of an intention to transfer possession are sufficient.

Any express covenant upon which the parties agree may be inserted in a lease. Those almost always present are the lessee's covenant to pay rent, a covenant that one party or the other will pay taxes and assessments, and the lessee's covenant to surrender the premises in good condition at the end of the term. Other express covenants may be that the lessor will repair buildings or renew the lease, or that the lessee will repair, or not assign or sublet, and the like. Words not plainly expressive of a covenant may be construed to indicate an intention to make one.

The implied covenants are that the lessor has the right to make the lease and that the lessee shall have quiet enjoyment of the premises. These covenants mean that the lessee shall not be disturbed by the lessor or any one claiming superior title; the lessor does not warrant the lessee against the acts of trespassers or other wrongdoers.

A Lease

Made and executed **Between** John Richards of the City of Batavia, New York, of the first part, and Henry Jackson of the City of Batavia, New York, of the second part, this first day of May in the year One thousand nine hundred and four.

In Consideration of the rents and covenants hereinafter expressed, the said party of the first part *has* **Demised and Leased,** and does hereby demise and lease to the said *party* of the second part the following premises, viz.:

a dwelling house situated on the east side of Park Street, between Allen Street and North Street, and known as 124 Park Street, Batavia, New York, with the privileges and appurtenances, for and during the term of one year from the first day of May, 1904, which term will end on the thirtieth day of April, 1905. And the said *party* of the second part *covenants* that *he* will pay to the party of the first part for the use of said premises, the monthly rent of forty Dollars ($40.00), to be paid monthly in advance.

And Provided, said *party* of the second part shall fail to pay said rent, or any part thereof, when it becomes due it is agreed that said party of the first part may sue for the same, or reënter said premises, or resort to any legal remedy.

The *party* of the first part *agrees* to pay all taxes to be assessed on said premises during said term except the water tax.

The *party* of the second part *covenants* that at the expiration of said term *he* will surrender up said premises to the party of the first part in as good condition as now, necessary wear and damage by the elements excepted.

Witness the hands and seals of the said parties the day and year first above written.

John Richards SEAL

Henry Jackson SEAL

176. Defects, repairs, and waste. The law is not very favorable to the lessee as regards defects, repairs, or the cutting of timber or the working of mines. He has but a temporary interest and must use the property so as not to decrease the value of the reversion.

1. *Defects.* Except so far as there are express covenants in the lease to the contrary, the lessee takes the premises in the condition in which they are when the lease is executed. There is no implied covenant that they are in good condition or fit for occupation.

There are two exceptions to this rule. (*a*) The lessor is liable if, known to him, the premises contain some concealed and dangerous defect which the tenant could not observe and which works him an injury, as, if the concealed portions of a building be dangerously defective or if the building has been infected with the germs of some dangerous disease. (*b*) In England and in some states it is held that in the lease of a furnished house there is an implied covenant or condition that it shall be habitable.

2. *Repairs.* The tenant is bound, unless otherwise stipulated, to make repairs to an extent necessary to return the premises in substantially the same condition as when he received them, ordinary wear and tear excepted. To this end he is entitled to estovers, that is, to take from the premises timber needed for repairs. The common law compelled him to restore buildings destroyed by accident or fire, but in many states this harsh rule has been changed.

3. *Waste.* The tenant cannot commit waste, that is, he cannot cut trees (except for estovers for repairs and for fuel), tear down buildings, open mines, take clay or sand, or otherwise substantially injure the freehold. He may work mines already opened unless restrained by his lease. A tenant committing waste is liable in treble damages, and in some states forfeits his lease. He may also be enjoined by an equity court from continuing to commit waste.

4. *Title.* The tenant cannot deny his landlord's title while in possession under the lease. It would be a fraud on the landlord for a tenant to get possession under a lease and then set up an adverse claim to the premises.

177. Assignment and subletting. The tenant may, unless he has contracted not to do so, either assign his whole interest or sublet the premises.

1. *Assignment.* Unless restrained by the lease the tenant may assign his estate. If he assigns it, he ceases to have any estate, although he remains liable for the rent and other covenants unless the landlord consents to the assignment. Such consent may be gathered from the acceptance of rent from the assignee. The law may work an assignment by the sale of the tenant's estate for debt or by his death. As an estate for years is personalty it passes to the executor of the deceased tenant and not to his heir.

2. *Subletting.* Unless restrained by the lease the tenant may sublet the premises or any part of them. A grant of the lessee's whole interest is an assignment; a grant of a part of his interest is a sublease. If he has an estate for ten years and grants one for eight, or if he grants a part of the premises, this constitutes a sublease. It has been held that granting a part of the premises for the whole unexpired term is an assignment as to that part, but the authorities do not agree as to this. A sublessee is the tenant of the first lessee, not of the landlord. But neither an assignee nor a sublessee while in possession can deny the landlord's title.

178. Rent and remedies for nonpayment. The rent reserved by the landlord who owns a fee is itself real property until due and payable, when it becomes personalty. Hence all rents due at the death of the owner go to the executor, while rents not accrued go to the heir.

The remedies of the landlord when the tenant fails to pay the rent are (*a*) an action in debt or covenant to recover the amount due; (*b*) reëntry on the premises if such right is reserved in the lease or is given by statute; (*c*) in some states a lien on the crops grown on the leased premises.

Many states forbid by statute the landlord to take forcible possession of the premises in case the tenant is delinquent, and nearly all states provide a summary judicial proceeding for the eviction of a tenant who is in arrears.

179. Termination of lease. A lease is terminated as follows:

(*a*) when the time fixed in it expires (as to tenants at will and from year to year, see sec. 158);

(*b*) when surrendered by voluntary act of the tenant acquiesced in by the landlord;

(*c*) when there is a breach of the tenant's covenant, which, by the terms of the lease, gives the landlord a right to terminate the tenant's estate;

(*d*) when the landlord's title is extinguished, as when a life tenant who lets the premises dies, or when the landlord is dispossessed of title by an adverse claimant;

(*e*) by statute in some states, when the buildings on the premises are destroyed without the tenant's fault; but at common law the destruction of the premises will not terminate the lease except where the tenant has hired only a part of the building.

REVIEW QUESTIONS

SECTION **157**. How is property classified when considered as an object? What two main classes in the law? What is real estate? What is personal estate? What is corporeal real property and what incorporeal? What is corporeal personal property and what incorporeal? Define land; tenements; hereditaments. What practical differences exist between realty and personalty?

158. How are estates in land divided? What is a freehold estate? What two classes? Define each. How is each divided? Define dower; curtesy; homestead estate. What four classes of estates less than a freehold? Define each.

159. What is a future estate? What is a reversion? What is a remainder? Illustrate.

160. What is a joint tenancy and how created? What is a tenancy in common? Characteristics of each? How is realty held by a partnership? What is a tenancy by the entireties? What is community property?

161. What is a private trust? How enforced? What is a charitable trust? How enforced? Illustrate.

162. What is included in the term land? What may one do with overhanging branches? Explain the ownership of waters.

163. What two classes of vegetable products? Which is realty? Which personalty? Who owns a border tree?

164. What is a fixture? State the rules to determine whether an article is a fixture. What is meant by physical annexation? When is an annexed article clearly a fixture? When is it doubtful? What difference does it make who annexes the article? What may a tenant remove?

165. What is the common law as to cattle trespass? What do statutes provide as to fences?

166. What is a nuisance? What is lateral support?

167. What is an easement? How may it be acquired? How in light and air? How in a right of way? What is a way of necessity? Explain rights in highways.

168. How must a contract to sell land be made? When does title pass? How does equity regard this? Illustrate.

169. How are conveyances of land made? What is a quitclaim deed? What is a warranty deed? What are the warranties? How must a deed be executed? Is delivery necessary? What is an escrow? What are the parts of a deed?

170. How must a will be executed? Explain who should not be witnesses, and why. If a devisee dies before the testator, what becomes of the devise? What effect has subsequent marriage on a will? Who may make a will?

171. If one dies without a will, to whom does his realty go? his personalty?

172. Explain title by adverse possession.

173. What is a mortgage? How is it executed? Why should it be recorded? What is an assignment? What is a discharge? What is foreclosure?

174. What other liens besides mortgages may be created upon lands? When is a judgment a lien? What is an abstract of title?

175. How is an estate for years created? When does it begin? What is the form of a lease? What express covenants may it contain? What covenants are implied?

176. Who takes the risk as to defects in the premises? Exceptions? Who must make repairs? What are estovers? What is waste? What is the penalty for waste? Why can the tenant not deny the landlord's title?

177. What is the effect of an assignment of a lease? When will it occur? How does a sublease differ from an assignment?

178. Is rent realty or personalty? What are the landlord's remedies against a tenant for rent? Is forcible entry allowed?

179. How is a lease terminated?

CHAPTER XV

PERSONAL PROPERTY

I. Classification: Kinds and Estates

180. Classification. Personal property consists of the following:

1. Chattels real, that is, leasehold interests in land. These have already been considered.

2. Chattels personal, including all property except property in land. Chattels personal are further divided into:

(*a*) *Choses* (i.e. things) in possession, or corporeal personal property, of which one may take physical possession and control, like coin, cattle, books, etc.

(*b*) *Choses* in action, or incorporeal personal property, that is, a legal right regarded as an object, as a right to sue for and recover a debt, a right to share in the profits of a corporation, the right to a patent, copyright, or trademark. Such a right may be evidenced by a *chose* in possession, as where a debt is evidenced by a promissory note, an interest in a corporation by a share of stock, or a monopoly to make and vend an article by letters patent. In such case the paper on which these evidences are inscribed is a *chose* in possession, but the right is incorporeal or "in action."

Personal property may become real property by being annexed to land as a fixture. This has already been discussed. Real property may become personal by being severed from the land, as when a tree is felled, or minerals are dug, or buildings pulled down. Some things growing upon land or attached to it are personalty, as growing crops or articles annexed, but not fixtures. A few movable articles are realty, as the keys to a house, the title deeds to land, or separable parts of a machine fixture.

Of the various kinds of personal property only a few can here be considered.

181. Property in animals. Animals are either domesticated or wild. In the former the owner has absolute property. In the latter one may have a qualified property, and this may ripen into an absolute property.

1. The owner of the land upon which wild animals are, has the exclusive right to hunt, capture, and kill them while they are there. Any person coming on his land for such a purpose without his permission is a trespasser; if such trespasser kills an animal there, whether it belongs to him or to the landowner is a disputed question.

2. One who captures a wild animal and keeps it in captivity has the exclusive right to it while it is in his possession. If it acquires the habit of returning after wandering at large, it is still his. But if it regains its natural liberty and remains at large, it is no longer his, and belongs to any one who captures or kills it. A mere temporary escape, however, may not amount to regaining its natural liberty, as where a canary escapes into the street or an animal from a menagerie.

3. One who rightfully kills a wild animal has the exclusive property in it.

4. One who keeps a wild animal of a dangerous or mischievous disposition does so at his peril. If it injures another, he is liable.

5. One who keeps domestic animals is liable if they escape and trespass upon another's land. But he is not liable for injuries due to their vicious disposition unless he knows of such vicious propensity in the particular animal doing the injury. Wild animals and vicious domestic animals, known to be such, one keeps at his peril.

182. Trademarks; good will; names. These are incorporeal property rights which call for special mention.

1. *Trademarks.* A trademark is a name, symbol, or other device put upon goods by a manufacturer or dealer in order to distinguish them from like goods of other persons. It is a kind of commercial seal or signature.

If the name or device is invented or fanciful, the user of it gets a property right in it. But if it is a word of common use,

he cannot get an exclusive property right in it, although he might prevent another from using it in the same connection for the purpose of deceiving the public. Words which merely describe the article, however, cannot become in any sense exclusive trademarks; nor can geographical names, because others in the same place have an equal right to the name of the place of manufacture.

Examples. Excelsior Stoves, Hoosier Drills, Electro-Silicon Powder, Congress Water, Champion Flour, 303 Pens, and the like are good trademarks. Lackawanna coal is not as against another miner in the same locality, nor Worcestershire sauce, nor Philadelphia cement. But if one makes tobacco at Durham and calls it "Durham tobacco," he may prevent another person making tobacco elsewhere from using the same name. So if one changes but a single letter, the legend may be deceptive though a different word is used, as where A has used the words "Royal Pens" and B puts out a product called "Loyal Pens."

2. *Good will.* The good will of a business is the good opinion of customers concerning the business and the probability that they will continue to patronize it. It is a valuable asset and may be sold with a business. Usually its sale is evidenced by the right to use the old name, perhaps with that of the successor added. The seller, if he has included good will in the sale with the right to use his name, cannot set up a rival business under the same name. If there is no sale of the right to use his name, he may set up a rival business under the name but cannot represent himself as carrying on the old business or as the successor of it.

3. *Names.* A man may choose his own name, although he usually bears his father's surname and the Christian name given him at his birth. In order to avoid the loss of evidence as to identity, statutes provide for a record of change of name if one chooses to avail himself of it, but one may nevertheless acquire a new name by usage. The law disregards all middle names; it is legally sufficient to use the first Christian name and the surname. So the word "junior" or "senior" is merely descriptive and no part of the name. A man cannot prevent another from using his name unless the other uses it for fraudulent

purposes. And one may even be enjoined from so using his own name in trade as to work a fraud, as where after A. B. has sold a certain kind of gun as "A. B.'s gun," another person of the same name puts a gun on the market stamped "A. B.'s gun."

183. Estates in personal property. Personal property, like real property, may be owned by two or more persons as joint tenants, tenants in common, partners, tenants by the entireties, and in community (see sec. 160).

There may be a life interest or estate in personal property with a remainder or reversion in another. If the property is corporeal, the life tenant may possess and use it; but if it is in the nature of money or security, the executor usually invests it and pays the income to the tenant for life. If the property is such as is consumed in the use, it must be intended that the remainder-man shall have only what may be left at the life tenant's death.

There may also be a trust of personal property (see sec. 161).

II. Acquisition and Transfer

184. Acquisition by occupancy and by finding lost property. The title to personal property may be acquired by taking possession of what no one owns or by taking possession of what some one has lost but never reclaims.

1. *Occupancy.* Personal property may be acquired by occupancy, that is, by taking into one's possession what previously belonged to no one or what has been abandoned by a previous owner. The taking of wild animals, the taking of fish, and the taking of seaweed on one's own property or on property common to all are examples of the first method. Raising a sunken vessel abandoned by the owner would be an example of the second.

2. *Lost property.* Lost property calls for special consideration. The general rule as to the title of the finder is that if one finds and appropriates lost property he has a title good against all but the true owner.

The law distinguishes, however, between lost property and mislaid property. If one finds a pocketbook on the floor of a

store, it is lost property and belongs to the finder unless the true owner reclaims it. But if he finds a pocketbook on the counter of a store, it is mislaid or left property and belongs to the owner of the store as bailee for the true owner, instead of to the finder. Should the true owner never reclaim it, the storekeeper retains it.

Treasure-trove is money, coin, or bullion hidden or concealed in the earth or other secret place. In England it belongs to the crown if no true owner claims it. In this country it is generally treated as lost property and belongs to the finder as against the owner of the lands where discovered.

Statutes often regulate the rights of finders of lost property, and generally require the finder to advertise the property found. In case the true owner does not reclaim it, some statutes provide that the property or its proceeds shall in whole or in part go to some public fund. The rights of finders of estrays (lost cattle) are particularly governed by statute.

If the finder knows who the owner is, or if the property discloses to whom it belongs, the finder is guilty of larceny in keeping the property as his own. But in order that this rule shall apply the finder must know these facts at the time of the finding and then form the felonious intent.

Examples: 1. X bought an old safe and delivered it to A to repair. A found in the space between the outer wall and the lining a sum of money. A may retain the money as against X.

2. A customer in a shop laid his pocketbook on a table and went away and forgot it. Another customer found it there. The shopkeeper is entitled to it as against the finder.

3. A was working for X in the latter's paper mill, and in picking over rags and paper found a number of bank bills. A is entitled to them as against X.

4. A conductor on a railway train finds a pocketbook in the train. It belongs to the conductor as against the railway company.

5. A and B, while working for X in removing an old building, discovered a rusty tin can containing a large sum of money. Who hid it there is unknown. The money belongs to A and B as against X.

185. Accession and confusion. Title by accession arises from the following circumstances: the natural increase from land

and animals; the uniting of the property or labor of one with the property of another; the confusion of the goods of one with the goods of another.

1. *Natural increase.* It is, of course, too plain for argument that if one owns land he owns its increase whether produced by nature or by industry. So, too, if one owns animals he owns their young, the rule being that the offspring go with the dam or mother.

2. *Accession of chattels.* (*a*) If the chattel of one is without his consent united with the land of another so as to become a fixture, the chattel becomes realty and belongs to the owner of the land; the owner of the chattel has only an action for damages for conversion. This is because the land is regarded as the principal thing and the chattel as an accessory.

(*b*) A similar rule applies when the chattel of one is inseparably united with the chattel of another: the whole belongs to the owner of the principal chattel, while the owner of the accessory chattel has only an action for conversion. Should the chattels be of approximately similar kind and value, the owners would become owners in common of the new product. A thing may be accessory, however, which is of greater value than the principal chattel, if the latter gives its name and character to the whole, as where materials of greater value than an old wagon are used to repair and renovate it. So, too, things of inferior value may by their owner be united by his labor or skill with things of greater value so as to create a practically new thing which will belong to him, as where with a smaller quantity of his wool united with a greater quantity of another's wool he weaves cloth, or with a smaller quantity of his material united with a larger quantity of another's he makes a ship, or furniture, or gold or silver ornaments.

(*c*) If a workman makes a new product by putting labor upon another's chattel so that there is a complete change of identity, the product belongs to the workman. If there is not a complete change of identity, the chattel will belong to him if the labor innocently bestowed is the principal item in the value of the new product, but will belong to the owner of the chattel

if the latter is the principal item in the value of the new product. This last rule is qualified where the workman knows the material is not his, many courts holding that in such case he must lose his labor although it may be more valuable than the chattel.

Examples: 1. B uses some links belonging to C in making a chain most of which was made from his own links. The chain is wholly B's. Had the links of C about equaled those of B in number, the two would have been owners in common.

2. B takes $8 worth of canvas belonging to him and $40 worth belonging to C, adds $10 worth of labor and makes a sail. The sail belongs to C.

3. B by mistake cuts wood on C's land. The wood as it was while growing was worth about $3 a cord. B's labor in cutting it into wood is worth about $2 a cord. The wood belongs to C.

4. B by mistake takes C's trees worth about $25 and makes them into hoops worth about $700. The hoops belong to B. A small excess of value of the labor would not be enough to deprive C of his property, but if the excess is great the labor becomes clearly the principal thing and the material the accessory thing.

5. As above. B knows the trees belong to C and puts the labor upon them. C may claim the hoops. B loses his labor because of his own conscious wrong in converting C's property.

6. In Example 5 B sells the hoops to X, an innocent purchaser. C may reclaim them. Since B had no title he could give none.

3. *Confusion of goods.* If the goods of one are so confused with the like goods of another that they cannot be distinguished and separated, the title to the mass will depend (*a*) upon the innocence or willfulness of the owner who caused the confusion, and (*b*) if willful, upon the possibility of clearly proving how much of his product is in the mixture. (*a*) If the confusion is innocent, each will be entitled to his aliquot portion of the mass as that may be reasonably established. The same rule applies where the confusion is by consent, as where wheat of several owners is mingled in a warehouse. (*b*) If the confusion is willful, the one causing it can claim his share only if he can clearly and decisively prove how much of each was mingled; failing in this he forfeits the whole mass to the innocent party.

186. Transfer by gift. A gift is a transfer of property by the owner without consideration. A gift *inter vivos* is a gift

to take effect at once by transfer of absolute possession to the donee, and is irrevocable. A gift *causa mortis* is a gift made by one in peril of imminent death by transfer to the donee, but upon condition that if the donor survives the peril he may revoke the gift and reclaim the property.

In a gift *inter vivos* delivery is the essential requisite, coupled, of course, with the intent to transfer as a gift. An intent to give is not enough. A promise to give is not effective because there is no consideration for the promise. There must be actual delivery so as to put the subject-matter of the gift out of the control of the donor. If the article is one that may be delivered by manual transfer, that form should be followed. But if it is bulky, or in the hands of a third person, a symbolic delivery will do, as the delivery of a key to the place where the article is kept, or the transfer of a warehouse receipt; but the delivery of the donor's own check (order) on a bank is not effective as a gift unless before the death of the donor the donee actually obtains the money. If the donee is already in possession, no new delivery is necessary; it is enough to show clearly the words of the gift. So a deed of gift duly delivered will take the place of the delivery of the subject-matter itself. If one wishes to forgive a debt, he should give the debtor a release under seal; but a receipt in full duly delivered and the balancing of the account on the books of the donor have been held sufficient.

In a gift *causa mortis* delivery is also necessary. The peculiarity of this gift is that it must be made in contemplation of imminent death (not merely of human mortality), and that it is to become absolute only in case the donor dies of the illness or peril then existing, without having revoked the gift. If he recovers or escapes the peril, he may reclaim the gift, and he may before his death revoke it. One in his last illness may make an absolute gift *inter vivos* or a conditional gift *causa mortis*, and it is a question of fact whether he intended to make the one or the other. A gift *causa mortis* bears considerable resemblance to a legacy in a will, differing mainly in this, that the article is delivered to the donee before the death of the donor, and no writing is necessary.

Examples: 1. A father places in an envelope certain articles and securities, indorses it, "The inclosed are for my son John," signs his name, and puts the envelope and its contents into his safe, where they are found after his death. This is not a valid gift. There has been no delivery.

2. A father gave to X a bag of coin, saying the contents were for his daughter. This was a valid gift. The delivery may be to a third person for the donee.

3. A father loaned his son a horse and buggy. After the son had possession the father said, "I give you that horse and buggy." This was a valid gift. There need not be a new delivery at the time of the gift.

4. A father in contemplation of immediate death gave to his son his (the father's) promissory note for $1000, and to his daughter his (the father's) check on a bank for $1000. The first gift is invalid; it is a mere promise to pay or to give. The second gift is valid if the check is cashed before the father's death, but the death of the father revokes the authority of the bank to pay it.

5. A father gives and delivers to his son the promissory note of X, and to his daughter the check of Y. These are valid gifts. If the instruments are payable to the father's order, he should indorse them, but his failure to do so will not, it seems, render the gift invalid, although the courts are not entirely in harmony upon that point.

6. A donor in his last illness told the nurse that his pocketbook was under the pillow, and that she was to take it and give it to his son. After his death the nurse took it and gave it to the son. This was not a valid gift, because there was no delivery in the lifetime of the donor.

7. The donor has money deposited in a savings bank. He delivers the savings-bank book to the donee as a gift. Most courts hold this sufficient to constitute a valid gift. It would not be sufficient in the case of an ordinary deposit in a bank of deposit; in such case there must be a due and formal assignment of the claim against the bank.

8. If B with the intent to make a gift to C deposits money in a savings bank in the name of C, and takes the savings-bank book in C's name, there is a valid gift. But intent must be established; it may be that the deposit was made in this way because B had already deposited in his own name all that the rules of the bank permitted. The delivery of the book to C would be quite decisive of intent, but this is not essential if intent otherwise appears, as from a declaration that he has made the gift.

9. One may make a gift in the form of a trust either (*a*) by declaring that he holds a sum of money in trust for C or (*b*) by transferring the sum to T to hold in trust for C. In the first case there is an "equitable gift" without any delivery and by a mere declaration.

187. Other modes of transfer. Other modes of transfer are by sale, will, distribution when the owner dies intestate, seizure and

sale for debt, mortgage, and at common law by marriage. Only a word need be added as to these.

A chattel mortgage is the transfer of the title to personal property as security for a debt, upon condition that if the debt is duly paid the mortgage and transfer shall be null and void. It is generally provided that in order to be valid against subsequent purchasers or mortgagees in good faith the chattel mortgage must be duly recorded, and some states require it to be renewed annually in order to remain valid. Unless otherwise stipulated the mortgagee is entitled to possession, but it is usual to leave the mortgagor in possession until default or until the mortgagee feels insecure. When possession is taken after default the mortgagee becomes the owner of the goods at law, but equity gives the mortgagor a right to redeem them. To cut off this right the mortgagee forecloses it by a sale of the goods either under a judicial proceeding or, if the mortgage gives him a power of sale, without such proceeding. Most states have statutes regulating foreclosures.

At common law a husband was entitled to all the personal property owned by the wife at the time of the marriage. Most states have changed this rule by providing that a married woman shall continue to own and control all her property the same as an unmarried woman.

REVIEW QUESTIONS

SECTION **180**. Of what does personal property consist? What are *choses* in action? When does personal property become realty? When does real property become personalty? What property attached to land is personalty?

181. What right has a landholder in wild animals on his land? What sort of property has one in a captured animal? How is it lost? If one kills a wild animal whose is it? For what damage done by his domestic animals is one liable? by wild animals kept in captivity?

182. What is a trademark? When is it property? If not property, has any one a right to use it? What is good will? What property has one in his name? What is the name recognized by the law as sufficient?

183. What estates in personal property?

184. What is title by occupancy? Who owns lost and found property? What is mislaid property? What is treasure-trove? Who owns it? When is a finder of lost property guilty of larceny?

185. What is title by accession? If the chattels of different owners are annexed, who owns the article so made? If one puts labor on another's chattel and increases its value, who owns it? Distinguish and illustrate. If one innocently mixes his goods with others', who owns the mass? If one willfully mixes them, who owns the mass?

186. What is a gift *inter vivos?* What is a gift *causa mortis?* Explain the essentials of each. How can one make a gift of a debt to his debtor? Is a gift revocable? Can one make a gift of his own promissory note or check, and why? When is a gift of a savings-bank deposit good? Can one make a gift *inter vivos* without delivery?

187. What other modes of transfer of personalty? What is a chattel mortgage? Why should it be recorded? Who is entitled to possession of the mortgaged chattels? After default where is the title? What is the equity of redemption and how is it disposed of? What effect has marriage on the title to personalty?

GLOSSARY

[Terms fully defined in the text are not included in this Glossary. For such terms the Index should be consulted.]

Abstract of title. An outline history of the title to land, consisting of a synopsis or summary of all conveyances, mortgages, liens, and charges affecting the parcel of land in question.

Acceptance. (*a*) The assent of the offeree to the proposal of the offeror, thus concluding a contract; (*b*) the act by which the drawee of a bill of exchange assents to the request of the drawer to pay it and makes himself liable to pay it.

Acceptor. The person who accepts a bill of exchange.

Acceptor supra protest. The person who, after it is protested, accepts a bill of exchange for the honor of the drawer or an indorser.

Accession. (*a*) That which is united to, or produced by, property; (*b*) the right to all that one's property produces or that is united to one's property.

Accommodation paper. A bill or note to which the accommodating party puts his name as indorser, maker, or drawer without consideration, in order to lend his credit to another.

Acknowledgment. (*a*) In conveyancing, the act by which one who has executed a deed or other instrument goes before a notary public, or other authorized officer, and declares or acknowledges that he did execute the same; (*b*) the certificate of the officer to that effect.

Act of God. Inevitable accident beyond human foresight or control. See **Vis major.**

Act of honor. The instrument drawn up by a notary certifying that a bill has been protested and that a person named has accepted or paid it for the honor of the drawer or an indorser.

Action. The proceeding in a court for the enforcement of a right; also called a suit.

Administrator. A person appointed by the court to administer the estate of a deceased person who has not by will named an executor. The feminine is administratrix.

Admiralty. (*a*) The system of law governing maritime causes; (*b*) the court administering this law.

Adult. One of the full legal age, usually twenty-one years.

Adverse possession. A possession of real property adverse to the right or title of another. If continued for a specified period, usually twenty years, it cuts off the right of the other to reclaim the property.

Affidavit. A written declaration under oath.

Agistor. One who pastures cattle for another.

Aleatory (Latin *alea*, a die, or chance). Depending upon an uncertain event.

Alienate. To convey; to transfer the title to property.

Allonge. The strip of paper attached to a bill or note to receive further indorsements after the back of the instrument is filled.

Alteration. Changing the terms of a written instrument.

Ambiguity. Doubtfulness or doubleness of meaning.

Ancestor. One from whom a person has descended in a direct line. Sometimes used in the broader sense of one from whom a person has inherited lands.

Annuity. A yearly sum stipulated to be paid to a person.

Answer. (*a*) In pleading, the matter set up by way of defense to an action; (*b*) a formal written statement containing the defense to an action.

Ante (Latin, before). Refers to a preceding part of a book.

Appeal. The removal of a cause from an inferior to a superior court in order to have the action of the lower court reviewed.

Articles. A contractual document containing the terms of an agreement.

Assets. (*a*) Property of a deceased person or a bankrupt available for payment of debts; (*b*) the aggregate available property of a merchant.

Assignment. The transfer of rights or interests.

Attachment. A process by which property is seized pending a suit.

Bankrupt. A person who under the bankruptcy laws is liable to have his property seized and distributed among his creditors.

Beneficiary. (*a*) A person entitled to the income or enjoyment of property the title to which is held by another as trustee; (*b*) the person to whom a life insurance policy is payable.

Bequeath. To give personal property by will to another.

Bequest. A legacy or gift of personal property by will.

Bilateral. In contract, signifying an agreement executory on both sides.

Bona fides (Latin, good faith). *Bona fide*, in good faith.

Bond. A sealed obligation to pay money. A bond and mortgage consists of a bond with a mortgage to secure its payment.

Bought and sold note. A bought note is given to the seller and a sold note is given to the buyer by a broker who acts as agent between the parties. These are memoranda of the contract.

Boycott (from the name of one Boycott, who was agent for an estate in Ireland). (*a*) A combination to cease dealing with a person; (*b*) a conspiracy to induce others to cease dealing with a person.

Breach. The violation or nonfulfillment of an obligation.

By-laws. Regulations or rules adopted by a corporation for its own government.

Cargo. Goods and merchandise put on board a ship to be carried from one port to another.

Case. A statement of facts upon which an action in a court is based.

Caveat emptor (Latin). Let the buyer beware.

Caveat venditor (Latin). Let the seller beware.

Champerty. A bargain by which an attorney agrees to carry on a suit at his own risk and cost in consideration that he shall receive in case of success a part of the proceeds of the suit.

Chancery. (*a*) A court of equity; (*b*) the system of jurisprudence administered in a court of equity.

Charter. (*a*) A legislative act together with proceedings taken thereunder by which a corporation is created; (*b*) to hire or lease a vessel.

Charter party. The contract by which a vessel or some principal part thereof is let for a voyage.

Chattel. An article of personal property. A more comprehensive phrase than goods, since it includes chattels real.

Chattel real. A chattel interest in land, as a leasehold.

Chose. A thing; any article of property. A *chose* in action is a right of action to recover a debt, demand, or thing.

Civil action. An action to establish a private right, as distinguished from a criminal action.

Civil law. The Roman law as distinguished from the English law.

Code. A legislative enactment intended to embody the law on a particular topic or, as in some states, on all topics.

Collateral. (*a*) In the law of descent, in a side line, not direct or lineal; (*b*) in commercial law, a security additional to the personal obligation.

Commercial paper. Bills, notes, and checks given in the course of commercial transactions. It does not include accommodation paper.

Common law. (*a*) The law of England, as distinguished from the civil law; (*b*) that part of the law of England developed by the common law courts.

Complaint. The name of the pleading by the plaintiff in an action at law. Sometimes called a declaration.

Composition. An agreement between an insolvent debtor and his creditors whereby the latter agree to take less than the whole of their claims.

Compromise. An agreement to settle a dispute made in view of the uncertainty of legal rights.

Conversion. An unauthorized assumption and exercise of ownership over goods belonging to another. It is a tort.

Conveyance. An instrument in writing under seal by which any estate in real property is created, aliened, mortgaged, or incumbered.

Copyright. An exclusive right granted by the government to multiply and sell a literary or artistic production.

Corporeal. Having an objective, material existence.

Costs. An allowance made to a successful party to a suit, to compensate for his expenses in conducting it.

Covenant. A promise contained in a sealed instrument.

Custom. In law, a usage so well established as to be regarded as having the force of law.

Damages. A pecuniary compensation recovered in a court for some injury or loss sustained through the wrongful act or omission of another.

Deceit. A fraudulent representation or device by which a person is misled to his damage.

Declaration. The pleading in which a plaintiff states his cause of action. *See* **Complaint.**

Decree. The name given to the judgment of a court of equity.

Deed. A sealed instrument containing a contract or conveyance.

Defendant. The person against whom an action is begun.

Del credere (Italian, of trust or credit). Applied to an agent who guaranties that purchasers will pay for goods of the principal sold to them.

Descent. In real property, the title given by force of law upon the death of an owner.

Devise. A gift of real property contained in a will. The devisee is the one to whom it is given; the devisor the one who gives it.

Earnest. A sum paid to bind a bargain.

Easement. A right in the owner of one parcel of land, as owner, to a use in the land of another.

Emblements. Annual products of the soil raised by labor and industry.

Equity. The system of jurisprudence administered in the equity courts. *See* **Chancery.**

Equity of redemption. The period allowed by equity for a mortgagor, pledgor, etc., to reclaim his property by paying the debt secured by it.

Escrow. A deed delivered to a third person to be held until the happening of some contingency, and then delivered to the grantee.

Estate. The interest one has in property. Sometimes used broadly to include all of one's possessions.

Estoppel. A bar raised by the law to preclude a man from setting up certain facts because of some prior admission or conduct. The verb is "to estop."

Estovers. The right of a tenant to take wood necessary for fuel, fences, and repairs is called a right to estovers.

Executor. A person appointed by the maker of a will (the testator) to carry out its provisions. The feminine is executrix.

Fee (same as feud or fief). Originally land held of a superior lord in consideration of military service. Now an estate of inheritance in lands.

Fee-simple. An absolute, unqualified fee; the largest estate one can have in lands.

Fee-tail (from French *taille*, a cutting). A fee from which the general heirs are cut off and only particular heirs are designated.

Fiduciary. (*a*) As a noun, a person in a relation of trust or confidence; (*b*) as an adjective, signifying a relation of trust or confidence.

Forcible detainer. Keeping possession of lands by force.

Forcible entry. Taking possession of lands by force.

Foreclosure. A proceeding for extinguishing the right of a mortgagor or pledgor to redeem the property given as security for a debt.

Forgery. Fraudulently making or altering a writing which purports to create or modify a legal right against another.

Franchise. A special privilege conferred by law upon an individual or a corporation, which does not belong to persons of common right.

Fraud. Some willful act or device calculated to influence or mislead a person to his prejudice.

Fructus industriales (Latin). Fruits of industry; products of land raised by labor.

Fructus naturales (Latin). Fruits of nature; natural products of land.

Fungible. Capable of being estimated or replaced by weight, measure, or number without reference to the particular characteristics of each unit.

Good consideration. A consideration based on family relationship or love and affection. A valuable consideration is one based on the surrender of something having a legal value.

Goods. Articles of personal property. Usually applied to inanimate movables. Chattel is a broader term.

Grant. A term signifying a transfer by deed of an interest in real property.

Heir. The person to whom by law the title to real estate descends upon the death of his ancestor.

In statu quo. In the condition in which (one was before).

In transitu. In transit.

Incorporeal. Without body or material substance.

Incumbrance. A claim, lien, or liability attached to property, as a mortgage, judgment, etc.

Indemnify. To save harmless; to secure against loss or damage.

Indenture. Formerly a deed in two copies with cut or serrated edges so that one would fit into the other. Now any deed by which two or more parties enter into reciprocal obligations.

Indorse. Literally, to write on the back.

Injunction. A writ issued by a court of equity forbidding or commanding something.

Insolvency. Inability to pay debts in due course.

Inter vivos. Between the living.

Intestate. Without a will or testament.

Joint and several. An obligation by two or more which may be enforced against all jointly or each individually.

Judgment. The decision of a common law court in an action before it; the final determination of the rights of the parties.

L.S. Abbreviation for *locus sigilli*, place of the seal.

Law. The rules by which courts are controlled in the administration of justice.

Legacy. A gift of personal property by will and testament.

Levy. A seizure of property to satisfy a judgment.

License. A permit to do an act which would otherwise be illegal, as to enter another's lands, but not creating an easement.

Lien. A charge imposed upon property by which it is made security for a debt or other obligation.

Liquidated damages. Agreed or ascertained damages; not uncertain.

Majority. Full legal age; usually twenty-one years.

Minority. Under legal age; infancy.

Municipal law. The law of a particular country as distinguished from international law.

Negligence. A failure to use the care that a reasonably prudent man would use under like circumstances.

Next of kin. Those relatives who share by law in the personal property of a deceased person.

Nominal damages. A trifling sum awarded to vindicate a legal right where no substantial damages have been suffered.

Notary public. A public officer authorized to certify or attest documents, take acknowledgments of deeds, etc.

Nuisance. A wrongful act which disturbs another in the enjoyment of real property or of a public highway.

Obligation. A legal duty to do or not to do a certain thing. An obligor is one who has undertaken an obligation. An obligee is one entitled to the performance of an obligation.

Orphans' court. The name given to the probate court in a few states.

Ownership. The right to possess and use property to the exclusion of others.

Parol. A word or speech; that which is expressed orally; not in writing.

Patent. An exclusive right granted by the government to make, use, and vend an article.

Per procuration (abbreviated Per pro.). By proxy. Used in England to indicate an agent that is acting under a special or limited authority.

Personal representative. An executor or administrator of a deceased person. The "real representative" is the heir of the deceased person.

Plaintiff. The person who brings an action in a court.

Pleadings. The written allegations as to claims and defenses in an action in a court.

Post (Latin, after). Referring to a subsequent portion of a book.

Prescription. Title by adverse possession. The law indulges the fiction that there was a prior writing which is now lost.

Probate. To prove, as to probate or prove a will. A probate court is one in which wills are proved.

Proof. The establishment of a fact by evidence.

Pur autre vie (or **per autre vie**) (French). For another's life.

Quantum meruit (Latin). As much as he deserved. Refers to an action for the reasonable value of services.

Quantum valebant (Latin). As much as they were worth. Refers to an action for the reasonable value of goods sold and delivered.

Quasi (Latin). Like; corresponding to.

Ratification. The confirmation of a previous contract or act which is not binding.

Receiver. A person appointed by a court to take possession and control of property pending litigation and some final decree of the court.

Recording acts. Statutes providing for the recording of deeds, mortgages, etc., in some public office, and providing that the record shall be constructive notice to all subsequent purchasers or incumbrancers.

Redemption. The act by which a mortgagor, pledgor, etc., reclaims the title and possession of the property by paying the debt so secured.

Release. The giving up of a claim by the person entitled, to the person against whom it exists.

Replevin. An action to recover possession of goods.

Rescission. The canceling or annulling of a contract or deed.

Residuary devisee. The person who under a will takes all the lands of the testator not specifically devised.

Residuary legatee. The person who under a will takes all the personal property of the testator not specifically bequeathed.

SS. An abbreviation used after the statement of the venue (state and county) and supposed to be a contraction of *scilicet* (*scire licet*), meaning "as one may learn," or "to wit," or "namely."

Seised. The technical term describing the possession of a fee in lands. This is the verb. The noun is "seisin."

Seisin. Under the feudal system, the completion of the formalities by which one was given possession of a fee in lands. Now the possession of a fee.

Set-off. A counter claim or cross demand which a defendant sets up against the claim of the plaintiff.

Simple. (*a*) In real-property law, absolute, unconditional, as fee-simple; (*b*) in contract law, unsealed.

Specialty. A contract under seal.

Specific performance. A decree by an equity court that a party shall actually perform his contract promise instead of paying damages for the breach.

Status. Legal position or condition.

Statute. An act of the legislature.

Statute of Limitations. A statute fixing a time within which actions must be brought.

Stock. (*a*) The total capital put into a corporate enterprise; (*b*) the interest of each stockholder in the corporation.

Subrogation. The substitution of one person in the place of another with respect to rights, claims, or securities. The verb is "to subrogate."

Subscribe. To write under; to write the name under the contract. To sign is to write the name at any place, not necessarily underneath.

Successor. One who succeeds another. Used to describe those who constitute a corporation after the retirement of preceding corporators.

Suit. A proceeding in a court. It is not uncommon to call a proceeding in a law court an action, and one in an equity court a suit; but this is not a necessary distinction.

Supra protest. Over protest. Used in the sense of "after protest."

Surrogate. Literally, one who is substituted for another. By present usage, the judicial officer who presides over a probate court for the administration of the estates of deceased persons.

Tenant. Broadly, one who holds land; specifically, one who holds land for life or for years; popularly, one who holds land for years of a landlord or lessor.

Testament. That which is witnessed. Employed as a synonym for will. Formerly it meant a will of personalty but is now used interchangeably with the term "will."

Testator. One who makes a will. The feminine is testatrix.

Title. (*a*) The right to property; (*b*) the evidence of the right to property.

Tort. A wrongful act, other than a mere breach of contract, for which a common law court will give damages.

Transcript. An official copy of a court record, as a transcript or certified copy of a judgment.

Treasure-trove. Treasure found. *Trove* is French for "found." Technically, gold or silver or money found hidden in a secret place.

Trespass (French *trespasser*, to pass over or beyond). To invade another's right of security of person or of property. Commonly, to enter another's lands wrongfully.

Trover (French *trover*, to find). An action for the recovery of damages for the conversion of goods, based originally on a fiction that the defendant had found the goods and refused to return them to the rightful owner.

Trustee. A person appointed to execute a trust.

Ultra vires (Latin). Beyond the power. Applied to acts of corporations beyond the charter powers.

Unilateral. One-sided. Applied to contracts where only one promise is still unperformed.

Vendor. The seller. Usually applied to the seller of real property.

Venue. (*a*) Locality; place. (*b*) The heading of legal documents showing the state and county.

Verdict. The decision of a jury upon matters submitted to it.

Vis major (Latin). Superior force. Includes more than act of God, as the act of a public enemy.

Void. Null; of no effect. This is the correct meaning, but the term is sometimes used in the sense of voidable.

Voidable. Capable of being rendered void, usually at the election of one party to a contract.

Waiver. The surrender of some right or privilege which the law gives.

Waste. The name given to any act of a tenant whereby the value of the reversion is diminished, as the cutting of trees.

Will. A written instrument executed as the statute directs, by which a person makes a disposition of his property to take effect after his death.

Witness. (*a*) One who gives evidence in a court; (*b*) one who sees a document executed and signs his name to it as evidence thereof.

INDEX

Abstract of title, 296
Acceptance and receipt, 72
Acceptance for honor, 194
  of bill, 172, 191–195
  of offer, 16–19
Accession, 307–309
Accident insurance, 130
Accommodation indorser, 197
Accounting by agent, 226
  by partner, 247
Act of God, 112, 115
Action, *see* Remedies
Administrative law, 3, 51
Admiralty court, 8
Adverse possession, 291
Agency, 215–237
  by necessity, 222
Agent, 41, 73, 138
  appointment of, 217–224
  authority of, 228–231
  liability to third parties, 233
  obligations to principal, 225
  of a corporation, 261
Agreement in contract, 14–16
Air, 282
Alteration of contract, 161, 190
Animals, 304
Answer, 9
Antecedent debt as value, 68
Appointment of agents, 217–224
Assault and battery, 5, 33
Assignment of contract, 49–52
  of lease, 300
  of mortgage, 291, 294
Attorney at law, 230
Auctioneers, 230
Authority of agent, 227–233
  of corporate officers, 261
  of partner, 247–249

Baggage, 123
Bailee's duties, 101, 102, 104, 106, 109, 113
Bailment, 96–127
  carriers of passengers, 122, 123
  common carriers, 113–122
  gratuitous, 100–103
  innkeepers, 111–113
  mutual benefit, 104–111
  telegraph companies, 124
Bailor's duties, 101, 102, 104, 106, 108
Bank deposits, 151, 152
Bankruptcy, 52, 59–61, 251
Banks, 111, 150, 151
Barter, 70, 97
Bilateral contract, 16
Bill of exchange, 172
  of lading, 119
  of sale, 69
Bills in a set, 173
Blanks in bill or note, 183
Bona fide holder for value, 67, 187
Bond, 22, 29, 30, 177, 264
Boycott, 48
Breach of contract, 56–59, 90, 91
  of warranty, 86
Brokers, 230
Business, 1
Business law, 3
Buyer's duties, 81

Call, 32
Capital, 143
Carriers of goods, 113–122
  of passengers, 122, 239
Cashier, 231
Cashier's check, 176
Casualty insurance, 130
Cattle trespass, 282

Caveat emptor, 39, 85, 187
Certificate of deposit, 152, 175
of incorporation, 257
of protest, 205
Certified checks, 208
Champerty, 33
Chancery court, 8
Charter of a corporation, 257
Charter party, 118
Chattel mortgage, 312
Chattel personal, 4, 303
Chattel real, 4, 303
Checks, 53, 145, 152, 175, 208, 209
Chose in action, 4, 66, 71, 303
Clearing house, 145
Clearing-house certificates, 145
Clubs, 218
Codification, 2
Collateral security, 104, 182
Commercial agencies, 144
Commodatum, 98
Common carriers, 113–122
Common law, 2
Communication of acceptance, 17
of offer, 16
of revocation, 18
Community property, 277
Compensation in agency, 224
in bailment, 107, 108
in corporations, 261
in partnership, 247
Complaint, 8
Composition with creditors, 23
Compound interest, 149
Concealment, 39, 135
Conditional sales, 67
Confusion of goods, 97, 309
Consent, reality of, 35–40
Consideration, 22–25, 28, 67–70, 96, 159, 170, 183
Constitutional law, 3
Contracts, 5, 13–64
negotiable, 168–214
of bailment, 96–127
of carriers, 116, 118
Contracts of guaranty, 157–167
of insurance, 128–141
of sale, 65–95
to sell lands, 283, 285
Contribution, 132, 139, 164
Conveyances of lands, 284
Corporations, 218, 244, 256–267
Corporeal property, 4, 270
Coupons, 177, 179
Covenants, 284, 297
Credit, 144
Creditors of a corporation, 265
of partnership, 249, 250
Criminal law, 3, 30
Courts, 7, 8
admiralty, 8
equity, 8
law, 7
Crops, 28, 72, 279
Cumulative voting, 260
Currency, 145
Current funds, 145
Curtesy, estate of, 273
Custom, 2, 51, 229

Damages, 58, 87, 90, 91
Date of bill or note, 183
Days of grace, 170
Death, 19, 51, 56, 103, 162, 223, 251 271
Deceit, 6, 38
Deed, 22, 284, 287
Defenses to negotiable instruments, 189–191
Del credere agent, 227
Delegation by agent, 226
Delivery by carrier, 118
by seller, 80
of deed, 286
of negotiable instrument, 184
Demand bills or notes, 187, 198
Deposit (*depositum*), 98
Deposits in banks, 111, 150
Description, sale by, 78, 83
Directors of a corporation, 260

Discharge of contract, 15, 52–61
of guarantor, 160–163
of mortgage, 291, 295
Discount, 153
Dissolution of corporation, 266
of partnership, 250
Dividends, 264
Divisible contracts, 35, 57
Dormant partner, 246
Dower, 273
Draft, 176
Drawee of bill, 172, 181, 193
Drawer of bill, 172, 195
Duress, 39

Earnest money, 27
Easements, 283
Emblements, 279
Employers' Liability Acts, 240
Equitable estates, 278
Equity courts, 8
Escrow, 286
Estates, 4, 270, 272–278, 306
Estates for years, 274, 296
Estates of inheritance, 272
Estoppel, 137, 229
Exchange, 146
Executed contract, 16
Executed sale, 66
Execution, 9
Executory contract, 16
Executory sale, 66
Express contract, 16
Express warranty, 82

Factor, 230
Factors Acts, 67
Fee-simple estates, 272
Fee-tail estates, 273
Fellow-servant, 239
Fences, 282
Fidelity insurance, 130
Finder of lost property, 96, 307
Fire insurance, 130
Fitness, warranty of, 84
Fixtures, 280–282
Foreclosure, 105, 296
Foreign exchange, 147
Forgery, 190, 222
Forms of documents:
Acceptances of bill, 192
Assignment of contract, 42
Assignment of mortgage, 294
Bill of exchange, 172
Bill of lading, 119
Bill of sale, 69
Bills in a set, 173
Bond, 29, 178
Bond coupons, 179
Cashier's check, 176
Certificate of deposit, 175
Certificate of incorporation, 257
Certificate of protest, 205
Certified check, 176
Check, 175
Contract, 40–42
Contract of sale, 73
Discharge of mortgage, 295
Guaranty, 165
Indorsements, 186
Land contract, 285
Lease, 298
Mortgage, 292
Notice of dishonor, 207
Partnership agreement, 252
Power of attorney, 220
Promissory note, 174
Protested note, 206
Puts and calls, 32
Stock certificate, 259
Transfer of stock certificate, 260
Warranty deed, 287
Will, 290
Fraud, 38, 67, 190, 233
Frauds, Statute of, 25–28, 70–73
Freehold estates, 272
Fructus industriales, 279
Fructus naturales, 279
Fungible goods, 78
Futures, 32

Gambling contracts, 31, 35
General agent, 229
General average, 138
General manager, 262
General partnership, 244
Gift, 307
  causa mortis, 308
  inter vivos, 308
Good faith, 134, 188, 225, 247
Good will, 251, 305
Goods, 66, 71
Grace, days of, 170
Gratuitous agent, 227
Gratuitous bailment, 100–103
Gratuitous promise, 22
Guaranty, 41, 157–167, 197, 208
Guaranty insurance, 130
Guests of an innkeeper, 111

Habendum, 286
Heir, 289
Hereditaments, 271
Hiring in bailment, 98, 106–111
Holder in due course, 187–191
Homestead estate, 273

Illegality, 25, 30–35, 163
Implied contract, 16
Implied warranties, 83–85
Impossibility of performance, 54–56, 223
Incorporeal property, 4, 270
Indefinite agreements, 15
Indemnity, 131, 158, 164, 225
Indivisible contracts, 34, 56
Indorsement, 185–187
Indorser's contract, 195–198
Infants, 19, 163, 217, 246
Injunction, 14, 49
Innkeepers, 111–113
Insanity, 21, 217, 223, 251
Insolvency, 59, 60
Insurable interest, 133
Insurance, 33, 128–141
Interest, 148–150, 154
International law, 3
Intoxication, 21
Irregular indorser, 196
Irrevocable agency, 223

Joint agents, 219
Joint and several obligations, 249
Joint obligations of partners, 249
Joint-stock companies, 244, 252
Joint tenancy, 276
Judgment, 9, 294

Land, 271, 278
Landlord and tenant, 296–301
Lateral support of land, 282
Law, 1–4
Lease, 296–298, 301
Legal-tender money, 53, 145, 146
Letter of credit, 193
Levy, 9
Libel, 5
Lien, bailee's, 110
  on property, 296
  seller's, 88
Life estates, 273
Life insurance, 129
Limited partnerships, 246
Loans, 152
Lobbying contracts, 33
Lost property, 96, 306

Mail, notice of dishonor by, 201, 202
  offer by, 17
Maker's contract, 191
Mandate (*mandatum*), 98
Marine insurance, 130, 138
Married women, 21, 52, 218, 246, 289, 312
Master and servant, 238–241
Memorandum of sale, 73
Minerals, 278, 279
Misrepresentation, 38
Mistake, 36, 37
Money, 145
Moral obligation, 22
Mortgage, 153, 291, 312
Mutuum, 97

Names, 305
National banks, 150
Necessaries, 20, 21, 222
Negligence, 5, 101, 102, 105, 107, 109, 110, 113, 123, 124, 132, 227, 238–241
Negotiability, 50, 171, 180–182
Negotiable instruments, 168–214, 232
Negotiable Instruments Law, 179
Negotiation, 185
Next of kin, 291
Notary, 204–206
Notice by guarantee, 159
Notice of defect in bill or note, 189
Notice of dishonor, 200–204, 207
Noting of protest, 206
Novation, 14

Obligation, 5
Occupancy, title by, 306
Offer and acceptance, 16–19
Officers of a corporation, 261
Open policy, 129, 131
Opinion, 39, 82
Option contracts, 18, 32
Orphans' court, 7
Ostensible partner, 245
Overdue bills or notes, 187

Partnership agreement, 252
Partnership real estate, 277
Partnerships, 218, 243–251
Part payment, 73
Passengers, 122, 239
Past consideration, 24
Pawn, *see* Pledge
Pawnbrokers, 106
Payment, 73, 81, 148
  for honor, 200
  of smaller sum, 23
Performance of contract, 53, 80
Personal property, 303–313
Pledge, 104–106
Policy of insurance, 129
  open policy, 129
  valued policy, 129
Power coupled with an interest, 223, 224
Power of attorney, 220, 228, 259
Powers of an agent, 227–233
  of a corporation, 262
  of a partner, 247–249
Preferred stock, 264
Presentment for acceptance, 194
Presentment of bill or note for payment, 198–200
Price, 70, 90
Principal and agent, 215–237
Principal and third party, 227–234
Probate court, 7
Procedure in courts, 3, 8, 9
Promissory note, 174
Property, 4
  in goods, 66
  in lands, 269–302
  in personalty, 303–313
Protest, 204–208
Provisions, sale of, 85
Public enemy, 115
Purchaser in due course, 67, 187
Puts and calls, 32

Qualified acceptance of bill of exchange, 192
  of offer, 18
Qualified indorsement, 185
Quasi-contracts, 6
Quitclaim deed, 284

Ratification, 20, 219–222
Real property, 4, 72, 269–302
Receipt, 148
Receiver, 266
Receiver's certificate, 266
Reëxchange, 205, 206
Referee in case of need, 193
Reinsurance, 130
Release, 15, 52
Remainder, estate of, 276
Remedies for breach of contract, 58, 90, 91

60581

Remedies for breach of contract of sale, 87–91
for breach of warranty, 86
of corporate creditors, 265
of firm creditors, 249, 250
of landlord, 300
Rent, 300
Repairs under a lease, 299
Report of corporation, 266
Representations in insurance, 135
Resale, 88, 89
Rescission, 52, 89
Restraint of trade, 33
Restrictive indorsement, 186
Reversion, estate of, 275
Revocation by guarantor, 162
of agency, 223
of offer, 18
Reward, offer of, 16, 24
Risk by servant, 240
Risk of loss of goods, 79

Safe-deposit company, 110
Sales of goods, 65–95
Sample, sale by, 83
Savings banks, 151
Seal, 28, 183, 219
Sealed instrument, 22, 28, 232. *See* Deed
Security for loans, 153
Seller's duties, 80
Seller's lien, 88
Servant, 238–241
Simple contract, 22
Slander, 5
Special agent, 229
Specialty, 22
Specific goods, 75–77
Specific performance of contracts, 14, 58
Standard fire-insurance policy, 138
Stare decisis, 2
State banks, 150
Statute law, 2
Statute of Frauds, 25–28, 70–74, 158, 159, 219, 297
Statute of Limitations, 24, 27, 29, 58
Stock certificate, 259
Stock corporations, 256
Stockholders, 258, 264, 265
Stoppage *in transitu*, 88
Subagent, 219, 226
Subletting by tenant, 300
Subrogation, 131, 139, 164
Subscriptions, 24
Substantial performance, 54
Substituted contract, 53
Suicide, 132
Surety, 157, 162
Surrogate's court, 7

Telegraph companies, 124
Telephone companies, 124
Tenancy at will, 274
by entireties, 277
by sufferance, 274
from year to year, 274
in common, 277
joint, 276
Tender, 53, 148
Tenements, 271
Third party in agency, 227–234
Third party to contract, 48, 49
Title insurance, 130
Title to goods, 66–70, 74–80
to lands, 284, 299
warranty of, 83
Tontine insurance, 129
Tort, 5, 48, 238–241
Trademarks, 304
Treasure trove, 307
Trees, 28, 278–280
Trespass, 5, 282
Trust, 6, 13, 278, 311
Trust companies, 150

Ultra vires acts, 263, 265
Unascertained goods, 77–79
Undisclosed principal, 231, 232
Undue influence, 39
Unilateral contract, 16
Usury, 149

Value, 23, 68, 188
Valued policy, 129, 131
Vegetable products, 279
Verdict, 9
Vice principal, 239
Voidable contracts, 19, 21, 217, 218
Void contracts, 19, 21, 217, 218. *See* Illegal contracts

Wagering contracts, 31, 131
Waiver, 52, 137, 182, 186, 200, 202
Warehouseman, 110
Warranty, 38, 57
Warranty in insurance, 136
in lease, 297
in sale of bill or note, 196
of authority, 233
of goods, 81–87
of title, 83
Warranty deed, 284, 287
Waste, 299
Waters, 279, 282
Wharfinger, 110
Will, 286, 289, 290
Writing, *see* Statute of Frauds

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